

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

July 11, 2025

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

MAUI

Denial of Petition for Contested Case Hearing filed by the Native Hawaiian Legal Corporation on behalf of Nā Moku Aupuni O Koʻolau Hui on December 19, 2024, Regarding Agenda Item D-9, Approved as Amended on December 13, 2024: *Issuance of Revocable Permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the Development, Diversion, and Use of Surface Water for Diversified Agriculture, Currently Existing Historical Industrial and Non-Agricultural Uses, Reservoir, Fire Protection, Hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park Purposes on the Island of Maui; Tax Map Keys: (2) 1-1-001:044 and 050, 1-1-002:002 (por.), 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017.*

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

BACKGROUND

At its meeting on December 13, 2024, under agenda item D-9, the Board approved as amended the issuance of a revocable permit for Tax Map Keys (2) 1-1-001:044 and 050, 1-1-002:por. 002, 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017, to Alexander & Baldwin, Inc. and East Maui Irrigation Company, Limited, (collectively the "Permittee") for water use on the Island of Maui. The Board received both oral and written testimony on the item from the Sierra Club of Hawaii ("Sierra Club"). The Board approved staff's recommendation as amended. After the Board's decision, both the Sierra Club of Hawaii ("Sierra Club") and the Native Hawaiian Legal Corporation on behalf of Nā Moku Aupuni O Koʻolau Hui ("Petitioner") verbally requested a contested case. The Board voted to deny both requests at the meeting. On December 19, 2024, the Department received a written petition for contested case from the Petitioner. A copy of the contested case petition is attached as **Exhibit A**. A copy of the approved as amended Board submittal is attached as **Exhibit B**.

PETITIONER'S REQUEST

Petitioner's written petition for contested case hearing identifies its members' interests. Petitioner alleges that its members engage in traditional and customary practices on a number of streams in East Maui, depend on the streams covered by the revocable permit for growing taro and feeding their families, and its interests are directly affected by the issuance of another revocable permit authorizing more water to be diverted in 2025. Additionally, Petitioner alleges that its members have seen streams run dry for long periods of time as a result of the diversions. Finally, Petitioner claims that the revocable permit for 2025 will adversely impact members' ability to continue to engage in and perpetuate their cultural practices that depend on free-flowing streams, such as gathering aquatic life, fishing, growing kalo, and transmitting traditional knowledge to future generations.

HISTORICAL BACKGROUND

This permit allows the diversion of State waters through the EMI Ditch System from the East Maui Watershed to Central Maui. It originates from four licenses granted to EMI for sugarcane cultivation by the Territory. The four licenses were: Keanae License (expired June 30, 1972), Nahiku License (expired June 30, 1977), Huelo License (expired June 30, 1982), and Honomanu License (expired June 30, 1986). The Board began issuing revocable permits for each of the license areas as the licenses expired.

On December 28, 1984, a group of East Maui Farmers¹, represented by Native Hawaiian Legal Corporation ("NHLC"), filed a petition for contested case hearing over the issuance of a long-term water license for the four license areas. On January 16, 1985, the Chairperson of the Board sent a letter to NHLC denying the request for contested case hearing. The East Maui Farmers appealed the denial to the Circuit Court of the First Circuit. Civ. No. 85-0939. The Circuit Court determined that petitioners had a right to a contested case hearing because at that time, the Board was the state agency tasked with managing the water resources of the East Maui Watershed Area and the diversions in question did not give priority to appurtenant water rights of East Maui Farmers. That contested case hearing was ultimately discontinued because the Legislature passed the State Water Code in 1987, placing the concerns of the East Maui Farmers within the jurisdiction of the CWRM.

On August 23, 1985, the Board approved the issuance of one long-term disposition for the diversion of water from the four license areas subject to compliance with HRS chapter 343. On October 9, 1986, the Chairperson for the Board of Land and Natural Resources submitted to the Office of Environmental Quality Control the Board's acceptance of the environmental assessment and negative declaration of impact for the issuance of one long-term license that would cover all four of the license areas. That environmental assessment was challenged in court, though ultimately not resolved through that action. Civ. No. 86-4698. In Declaratory Ruling No. 86-3, the Environmental Council determined that the environmental assessment was insufficient because it did not consider available information from the University of Hawaii Environmental Center and the U.S. Fish and Wildlife Service.

¹ The petition listed the following petitioners: Harry Kunihi Mitchell, Guy K. Ohigashi, James Kaaihue III, Abraham Akiona, Harry Pahukoa, Elaine Kainoa Needham, James J. K. Hueu, Marvin Hanchett-Ching, Solomon Kaauamo, Nils and Bonnie Mondoe, Edward Kaiwi, Ella Maui Hoopai Oliveira, Daisy M. Lind, Solomon Hoopai, and Francis K. Lono, Jr.

In light of the contested case hearing request from 1984-1987, the creation of the State Water Code, and pending federal cases regarding whether the Hawai'i Supreme Court's decision in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *aff'd on rehearing* 55 Haw. 260, 517 P.2d 26 (1973) violated the Fifth Amendment, the Board elected to hold off on issuing a long-term license.

Between the expiration of the last license in 1986 and 2000, the Board continued revocable permits for the diversion of water because pending federal cases and the creation of CWRM generated numerous questions about water rights under state law.

In 2000, A&B requested the Board again take up the issuance of a long-term license for the diversion of water from East Maui Streams. On May 25, 2001, the Board again took up the issue of a long-term license at the request of EMI and A&B.

In 2001, Petitioner requested a contested case hearing over the issuance of a thirty-year water license via public auction and the continuation of revocable permits for the water diversions covered by the 2024 revocable permit. While a full evidentiary hearing was held and the parties submitted proposed Findings of Fact and Conclusions of Law, the contested case was ultimately discontinued because the only issue that remained in the jurisdiction of the Board was the preparation of an environmental impact statement, which was completed and published in the Environmental Notice on September 8, 2021.

In 2018, CWRM issued its Findings of Fact, Conclusions of Law, and Decision and Order in CCH-MA13-01, which amended interim instream flow standards for Honopou, Hanehoi/Puolua (Huelo), Waikamoi, Alo, Wahinepe'e, Puohokamoa, Ha'ipua'ena, Punalau/Kōlea, Honomanū, Nua'ailua, Piinau, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Pua'aka'a, Waiohue, Pa'akea, Waiaaka, Kapaula, Hanawī, and Makapipi Streams.

<https://files.hawaii.gov/dlnr/cwrml/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>.

This contested case hearing was held as a result of Petitioner, Beatrice Kepani Kekahuna, Marjorie Wallet, and Elizabeth Lehua Lapenia's Petition to Amend the Interim Instream Flow Standard for 27 streams in East Maui.² CWRM determined system losses of 22.7% for the EMI Ditch System to be reasonable. FOF 737. CWRM considered maintenance of fish and wildlife habitats, outdoor recreational activities, maintenance of ecosystems such as estuaries, wetlands, and stream vegetation, aesthetic values such as waterfalls and scenic waterways, and the protection of traditional and customary Hawaiian rights in amending the IIFS. FOFs 62-71, 87-90. Petitioner did not appeal CWRM's Decision and Order in CCH-MA13-01

² The procedural history of that proceeding spans nearly two-decades. The details are outside the scope of this staff submittal, but are available here:

<https://dlnr.hawaii.gov/cwrml/surfacewater/ifs/eastmauiifs1/>.

In 2021, a petition was filed to amend the IIFS for the streams in the eleven hydrologic units of the Huelo Region.

<https://files.hawaii.gov/dlnr/cwrmm/activity/eastmaui3/20210928-PAIFS.pdf>.

In 2022, CWRM adopted IIFS for those streams.

<https://files.hawaii.gov/dlnr/cwrmm/submittal/2022/sb20221115B5.pdf>.

From a review of the record, Petitioner apparently did not provide testimony on this matter and did not challenge this decision.

DISCUSSION

A. Petitioner Lacks Standing for a Contested Case Hearing.

The Hawai'i Supreme Court has ruled that similar to lawsuits filed in court under the Hawai'i Rules of Civil Procedure, petitions for contested case hearings must assert "injury in fact" standing. *Community Associations of Hualalai, Inc. v. Leeward Plan. Comm'n*, 150 Hawai'i 241, 258, 500 P.3d 426, 443 (2021) ("*Hualalai*"). The injury in fact standing test requires: "(1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action." *Id.* (quoting *Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 204, 317 P.3d 27, 38 (2013)). Hawai'i Supreme Court has also noted, however, that "where the interests at stake are environmental concerns" it is less inclined to "foreclose challenges to administrative determinations through restrictive applications of standing requirements." *Id.*

As discussed herein, while Petitioner has likely claimed an actual or threatened injury sufficient to satisfy the first prong of the test for standing, it ultimately does not have standing because it cannot satisfy the second and third prongs. The deficiencies in Petitioner's request for a contested case hearing are jurisdictional; the relief it seeks can only be granted by CWRM. Staff's recommendation is accordingly not overly restrictive and Petitioner's request can be rightfully denied. *See Hualalai*, 150 Hawai'i at 258, 500 P.3d at 443.

1. *Actual or Threatened Injury*

Petitioner alleges that it is entitled to a contested case based on Article XI sections 1 and 9 and Article XII Section 7 of the state constitution. Specifically, it alleges that its members would be harmed by too much water being removed from the streams. Such actual or threatened injury has been held to be sufficient to satisfy the first prong of the standing test, particularly when the potential injury implicates environmental concerns. *See, e.g., Hualalai*, 150 Hawai'i at 258-59, 500 P.3d at 443-44; *Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 204, 317 P.3d 27, 38 (2013).

2. *Not traceable to the challenged action.*

The petition claims that the Petitioner's members are directly affected by the issuance of the revocable permit because its members live along and draw water from the affected streams for residential and farming purposes, and that they use and enjoy the streams for recreational, cultural and spiritual purposes such as hiking, fishing and swimming, and traditional and customary practices. The injuries asserted by the Petitioner are that its members have "seen streams run dry as a result of A&B/EMI's diversions", and that the "approval of the permits for 2025 will adversely impact members' ability to continue to engage in and perpetuate their traditional practices that depend on free-flowing streams; gathering aquatic life, fishing, growing kalo, and transmitting traditional knowledge to future generations". Petitioner additionally asserts that without the Board's approval of the revocable permit, "A&B/EMI could not take any water from streams flowing through the areas covered by the revocable permit for its (and Mahi Pono's) private, commercial use".

These injuries are not traceable to the challenged action. Petitioner does not provide any evidence that supports their claim that streams run dry because of the Permittee's diversions.³ Additionally, the revocable permit requires full compliance with the IIFS and all other applicable laws and regulations. Therefore, even if certain streams were dry due to the Permittee's diversions which caused injury to the Petitioner's protected interests, then addressing that issue would be under the authority of CWRM, to either further modify the IIFS or enforce against a potential violation of the IIFS. The Board's approval of the revocable permit was neither the cause of the injury nor the appropriate avenue to address any injury caused. Contrary to the Petitioner's claim, the Board's approval of the revocable permit is not a "but for" causation of the Petitioner's alleged injury. Even if the revocable permit were not approved, other diversions of water from the same streams that comply with the current IIFS could occur, resulting in the same alleged injury to Petitioner. Therefore, the only avenue to truly address Petitioner's concerns would be through the IIFS process under CWRM.

Under the Hawai'i Constitution, all state water resources are subject to protection, control, and regulation, as provided by the Legislature. The statutory framework set up by the Legislature established CWRM in HRS chapter 174C, the State Water Code (or Water Code) to address water conservation and use policies, including the beneficial and reasonable uses of water. As established, only CWRM may administer and enforce provisions of the State Water Code, and all administrative rules made thereunder. *See also* HRS § 26-15(a) ("for matters relating to the state water code where the commission on water resource management shall have exclusive jurisdiction and final authority"); HRS § 174C-7 ("there is established within the department a commission on water resource management... which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as specifically provided in this chapter"). The Water Code states, "no state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter..." HRS § 174C-4. Consequently, the Board does not have jurisdiction over either interim instream flow standards (IIFS) or the location of a stream diversion. Rather, the Board must comply with CWRM's decisions regarding IIFS and stream diversion locations. *Compare* HRS chapter 171 *with* HRS chapter 174C; *see also* *Morgan v. Planning Dep't*,

³ The dry streams could be the result of other factors, such as drought, with no causal relation to the diversions.

Cnty. of Kaua'i, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004) (“An administrative agency can only wield powers expressly or implicitly granted to it by statute.”) (quoting *TIG Ins. Co. v. Kauhane*, 101 Hawai'i 311, 327, 67 P.3d 810, 826 (App. 2003)).

As previously noted, the revocable permit was issued with the condition that the permittee comply with proposed IIFS developed, and potentially amended, by CWRM, which accounts for beneficial instream uses including the protection of native flora and fauna. The Board specifically conditioned the revocable permit for water on compliance with the proposed IIFS because it recognized CWRM as the appropriate agency to determine the amount of water required to remain in the stream. HRS § 174C-71. To the extent that Petitioner's members' use of the streams is protected as instream uses, but are affected by diversions, they may have standing before CWRM to amend the IIFS or determine amounts where a stream diversion may be permitted. Because the remedy they seek is within CWRM's jurisdiction, any claimed injury is not traceable back to the Board's issuance of a revocable permit.

3. *Likely to be remedied by favorable judicial action.*

A favorable decision at a contested case hearing based on the revocable permit would not remedy Petitioner's claimed injury. Only CWRM acting under HRS chapter 174C, and not the Board under HRS chapter 171, may address aspects of water use regarding a stream. Traditional and customary rights of ahupua'a tenants, as addressed in the Water Code, shall include, but not be limited to, “the cultivation or propagation of taro on one's own kuleana and gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.” HRS § 174C-101(c). Issues, such as efficiency of the diversion system, are under the jurisdiction of CWRM. *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 257, 287 P.3d 129, 158 (2012); HRS § 174C-71(2)(D). And only CWRM may order modifications to stream works diversions. HRS § 174C-93.

Reading HRS chapter 171 together with HRS chapter 174C, in matters of water allocation, the Board's role is limited to considering requests for revocable permits and imposing conditions as may be required.⁴ As such, even a favorable decision at a contested case hearing would not afford the Petitioner with relief that would adequately address its claimed injuries, and it accordingly does not have standing for a contested case hearing. Furthermore, as noted previously, the Petitioner's alleged harm of streams running dry is not an injury that can be assuredly remediated by contested case regarding the revocable permit. Even if the contested case resulted in the most severe outcome of terminating the revocable permit, that would not ensure water flowing in the streams if other conditions, such as drought were to occur.

⁴ In the continuum of water regulation under the Water Code, the streams in question are not designated as part of a water management area and so are not subject to the additional CWRM regulatory controls such as water use permitting, which are required after designation. Accordingly, while the Board does not and cannot issue a stream diversion works permit (HRS § 174C-93), it may issue a revocable permit for water subject to existing strictures such as the IIFS set by CWRM and by chapter 171 statute.

C. A Contested Case is Not Required by Statute, Rule, or Due Process.

An administrative agency must only hold a contested-case hearing when it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or (3) constitutional due process. *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai‘i 376, 390, 363 P.3d 224, 238 (2015). When a contested-case hearing is required by statute or administrative rule, the analysis is simple. However, HRS § 171-55 does not have a contested case requirement. Likewise, there is no such requirement in any applicable administrative rule. The remaining question, then, is whether Petitioner is entitled to a contested case hearing as a matter of due process. The petition identifies Article XI, Sections 1 and 9, and Article XII, Section 7 of the Hawaii Constitution as the constitutional due process basis for Petitioner being entitled to a contested case.

There is a two-step process in determining whether constitutional due process entitles a person to a contested-case hearing. First, a court must consider “whether the particular interest which claimant seeks to protect by a hearing is ‘property’ within the meaning of the due process clauses of the federal and state constitutions.” *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai‘i 114, 424 P.3d 479 (2018). Second, if a court “concludes that the interest is ‘property,’ th[e] court analyzes what specific procedures are required to protect it.” *Id.*

To have a property interest to satisfy the first step, a person “must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Sandy Beach Def. Fund v. City & County of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests “are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]” *Flores*, 143 Hawai‘i at 125.

Regarding the second step, the touchstone of due process is “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without procedural safeguards. With respect to step two, the Hawai‘i Supreme Court has been careful to emphasize that “[d]ue process is not a fixed concept requiring a specific procedural course in every situation.” *Id.* Due process “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In determining what procedures are necessary to satisfy due process, the administrative agency must examine and balance three factors:

- (1) the private interest which will be affected;
- (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and
- (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 143 Hawai‘i at 126-127.

Step One: Petitioner May Identify a Constitutionally Cognizable Property Interest

Petitioner alleges that the Board's action violated the right of its members to 1) engage in traditional and customary practices that depend on free-flowing streams, and 2) a clean and healthful environment including the conservation, protection and enhancement of natural resources. Petitioner argues that these rights are constitutionally protected property interests under Article XI, Section 9 and Article XII, Section 7 of the State Constitution. The Hawai'i Supreme Court has held that both the right to conduct traditional and customary practices (see *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Hawaii 425, 442, 881 P.2d 1246, 1263 (1995)) and the enjoyment of "a clean and healthful environment, as defined by laws relating to environmental quality" can constitute property interests within the meaning of the due process clause, (see *In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019) (quoting Hawai'i Constitution art. XI, sec. 9) (emphasis added)). However, the lack of standing is significant. While Petitioner has asserted recognized property interests, those interests are not implicated by the Board's issuance of a revocable permit. Because only CWRM may regulate the quantity and flow of a stream, modifications to stream works diversions, and reasonable system losses, denial presents no risk of erroneous deprivation but granting a contested case hearing presents substantial costs to government time and resources.

Step Two: Even if Petitioner Identified a Constitutionally Cognizable Property Interest, It Is Not Entitled to a Contested-Case Hearing Based Upon the Specific Factual Situation at Issue

Assuming Petitioner has established that it is seeking to vindicate a constitutionally cognizable property interest, it is not entitled to a contested-case hearing under the current circumstances. As discussed, even a favorable ruling would not afford Petitioner the relief it seeks, and as such, there is little risk of *erroneous* deprivation of a protected interest. The DLNR likewise has a significant interest in declining to grant a timely and costly contested case hearing that is not empowered to resolve the key issues in dispute.

Risk of erroneous deprivation of such interest.

A party is not at risk of the erroneous deprivation of its protected interest when it has "already been afforded a full opportunity to participate in a contested case hearing and express [its] views and concerns on the matter," such that "the provision of an additional contested case hearing is [not] necessary to adequately safeguard against erroneous deprivation" of its rights. *Id.*, 143 Hawai'i at 127, 424 P.3d at 482. Flores essentially sought a distinct hearing "in order to express the same concerns, and to vindicate the same interests, that he previously raised in the [prior] contested case hearing[.]" *Id.* Thus, in *Flores*, the supreme court held the appellant was not entitled to a contested case to challenge a Board decision because he had already "participated extensively" in a prior contested case hearing on a similar decision "by presenting evidence ... and arguments concerning the effect that the" challenged action would have in his protected rights. *Id.* at 127, 424 P.3d at 482.

The *Flores* court also noted that the appellant did not clarify the extent to which he would put forth evidence and arguments "materially different" from that which had already been proffered in the

previous contested case. *Id.* "On this particular record," the *Flores* court wrote, "we are not convinced that an additional contested case hearing would offer any probable value in protecting against the erroneous deprivation of his interest[.]" *Id.*

In 1984, East Maui Farmers requested a contested case hearing over the issuance of a thirty-year for the diversion of water through the EMI System. The petitioners agreed to withdraw their request for contested case hearing because the establishment of CWRM in 1987 made clear that the real issue was setting interim instream flow standards, which was outside the jurisdiction of the Board.

In 2001, Na Moku requested a contested case hearing over the issuance of a thirty-year water license via public auction and the continuation of revocable permits for the water diversions covered by the 2024 revocable permit. While a full evidentiary hearing was held and the parties submitted proposed Findings of Fact and Conclusions of Law, the contested case was ultimately discontinued because the only issue that remained in the jurisdiction of the Board was the preparation of an environmental impact statement, which was completed and published in the Environmental Notice on September 8, 2021.

In 2018, CWRM issued its Findings of Fact, Conclusions of Law, and Decision and Order in CCH-MA13-01, which amended interim instream flow standards for Honopou, Hanehoi/Puolua (Huelo), Waikamoi, Alo, Wahinepe'e, Puohokamoa, Ha'ipua'ena, Punalau/Kōlea, Honomanū, Nua'ailua, Piinau, Palauhulu, Ohia (Waiānu), Waiokamilo, Kualani (Hamaui), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Pua'aka'a, Waiohue, Pa'akea, Waiaaka, Kapaula, Hanawī, and Makapipi Streams.

<https://files.hawaii.gov/dlnr/cwr/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>.

This contested case hearing was held as a result of Na Moku, Beatrice Kepani Kekahuna, Marjorie Wallet, and Elizabeth Lehua Lapenia's Petition to Amend the Interim Instream Flow Standard for 27 streams in East Maui.⁵ CWRM determined system losses of 22.7% for the EMI Ditch System to be reasonable. FOF 737. CWRM considered maintenance of fish and wildlife habitats, outdoor recreational activities, maintenance of ecosystems such as estuaries, wetlands, and stream vegetation, aesthetic values such as waterfalls and scenic waterways, and the protection of traditional and customary Hawaiian rights in amending the IIFS. FOFs 62-71, 87-90.

In 2021, a petition was filed to amend the IIFS for the streams in the eleven hydrologic units of the Huelo Region.

<https://files.hawaii.gov/dlnr/cwr/activity/eastmaui3/20210928-PAIFS.pdf>.

In 2022, CWRM adopted IIFS for those streams.

⁵ The procedural history of that proceeding spans nearly two-decades. The details are outside the scope of this staff submittal, but are available here:

<https://dlnr.hawaii.gov/cwr/surfacewater/ifs/eastmauiifs1/>.

<https://files.hawaii.gov/dlnr/cwrn/submittal/2022/sb20221115B5.pdf>.

From a review of the record, Petitioner apparently did not provide testimony on this matter and did not challenge this decision.

With respect to the issuance of the revocable permit, the Board included conditions in the permit that served the best interests of the State and satisfactorily addressed the concerns raised by Petitioner's members in regard to their right to conduct traditional and customary practices and a clean and healthful environment. These conditions included limiting the amount of water diverted; requiring compliance with the IIFS; address system loss, removal of diversions, trash and debris; and the submission of reports by the Permittee regarding water use.

Given the factual circumstances of Petitioner's current request, there is no risk of an erroneous deprivation of Petitioner's interests here. The Department followed all applicable Sunshine Law requirements in providing the public notice of the December 13, 2024, Board meeting. The Petitioner submitted written testimony on the agenda item. During the Board meeting, Petitioner also provided oral testimony, and on the same issues raised in their present request to justify a contested case hearing. Therefore, the Petitioner was granted sufficient due process. Moreover, the Board did consider those issues in its decision making, reflected by amendments adopted as part of its approval.

Petitioner claims that its participation in a contested case would "ensure that the Board upholds its kuleana to the public in the protection of our trust resources as well as Native Hawaiians, whose traditional and customary practices are protected by the state constitution." The Petitioner also contends that the current revocable permit raises "issues related to water and ability to use groundwater in lieu of diverting surface water. A contested case hearing would allow the parties to put forth evidence, cross examine witnesses, and develop a complete record, giving the Board an opportunity to do a thorough analysis of the evidence and impacts and to make specific findings of fact to support its decision. This could not be accomplished at the December 13, 2024, board meeting."

Petitioner does not raise any specific facts or injury that would indicate a contested case would further serve due process than what was already provided at the meeting. Moreover, Petitioner does not refer to any specific evidence regarding the use of groundwater as an alternative to surface water or other issues raised in the petition that would indicate that the Board did not make an informed decision when approving the permit. To the extent that Petitioner claims to have new information that was not available and could not have been presented to the Board at its meeting on December 13, 2024, Petitioner had ample opportunity to provide such information to the Board at that time rather than seeking to present it in a contested case. Furthermore, simply providing Petitioner the ability to cross examine witnesses does not by itself entitle Petitioner to a contested case. Petitioner does not identify any specific information it seeks to obtain from cross-examining witnesses that was not available at the time of the Board's decision. In the event Petitioner is seeking to re-litigate those issues, a contested case proceeding is not the proper forum to do so.

Petitioner also appears to indicate that a Ka Pa'akai analysis should be included as part of the contested case. Staff notes that analysis has already been completed by CWRM as part of

amending the IIFS, which the revocable permit is already subject to. As noted previously, the proper avenue for Petitioner to seek relief is from CWRM. If Petitioner desires to pursue such relief from CWRM, a Ka Pa`akai analysis can be done as part of their process. Furthermore, in the precedent decision of *Ka Pa`akai O Ka`aina v. Land Use Commission*, 94 Hawaii 31, 7 P.3d 1068 (2000), the Hawaii Supreme Court determined that a Ka Pa`akai analysis was required for actions by an agency in its regulatory capacity, specifically the Land Use Commission considering a district boundary amendment. Staff does not believe that case applies in this instance. In this present case for the revocable permit, the Board is exercising its authority in a proprietary function as a steward of the water resource where the regulatory authority for the resource has been within CWRM, an entirely different State entity. Additionally, requiring the Board to conduct a Ka Pa`akai analysis when exercising its proprietary authority implies that the Board through a land disposition could potentially impact the rights held by others to conduct traditional and customary practices. That is clearly not within the Board's authority as a landowner or steward, as the right to conduct traditional and customary held by others cannot be abridged by the Board through a disposition of land or other interest held by the State. Each are separate and distinct rights held by different parties. To conclude otherwise would essentially result in granting the Board additional rights beyond what it holds as a landowner.

As has been discussed at length, a contested case hearing stemming from the Board's issuance of a revocable permit would not afford Petitioner the relief it seeks – to require more water remain in the stream. Given that Petitioner had adequate notice, participated extensively in the Board process, and the relatively limited scope of relief a hearing officer could grant, there is low risk of the erroneous deprivation of a protected right.

3. *Government interests*

The governmental interest, including the burden that holding a contested-case hearing would entail, weighs very heavily in favor of rejecting the contested case petition. Contested case hearings are expensive and time-consuming endeavors for the staff of the Department of Land and Natural Resources, the Board, and its attorneys. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested case hearings and may go into the many tens-of-thousands of dollars, once again not counting staff and attorney time. Petitioner has failed to justify why the Department should bear such costs and spend many hours of staff time on a contested-case hearing of extremely limited, if any, import.

Petitioner been provided ample opportunity to participate in multiple hearings to advocate for the protection of any property interests they may have. In addition to matters presented to the Board, Petitioner has been included in stakeholder meetings to address issues of East Maui water held by CWRM. In those meetings that staff did not witness Petitioner raise any issues relating to the diversions allowed under the revocable permit. Rather, staff's recollection is that Petitioner's representatives generally expressed satisfaction with the efforts made by the Permittee to protect Petitioner's interests. Therefore, Petitioner has been provided sufficient due process in this matter and is not entitled to an additional contested case simply because it does not agree with the Board's decision.

Balancing the government interests alongside that of Petitioner's weighs heavily on the side of the government. The time and resources of contested case hearing are justified in some instances. This, however, is not such an instance. A contested case hearing in this matter is not justified because the hearing officer, as was true for the Board, would not be empowered to grant Petitioner the relief it seeks. And the DLNR is not required to bear the financial and administrative costs of a contested case hearing so that the Petitioner can engage in an exercise of futility as it encourages the Board or a hearing officer to exercise power that it/he/she does not possess.

RECOMMENDATION

That the Board deny the Petition for a Contested Case Hearing filed by Nā Moku Aupuni O Ko'olau Hui on December 19, 2024.

Respectfully Submitted,



Ian Hirokawa
Acting Administrator

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

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PETITION FOR A CONTESTED CASE HEARING

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390
2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
4. Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
5. All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Nā Moku Aupuni O Ko'olau Hui	2. Contact Person Please contact the attorney listed below.	
3. Address 1164 Bishop Street, Suite 1205	4. City Honolulu	5. State and ZIP Hawai'i 96813
6. Email ashley.obrey@nhlchi.org	7. Phone (808) 521-2302	8. Fax n/a

B. ATTORNEY (if represented)		
9. Attorney Name Ashley K. Obrey	10. Firm Name Native Hawaiian Legal Corporation	
11. Address 1164 Bishop Street, Suite 1205	12. City Honolulu	13. State and ZIP Hawai'i 96813
14. Email ashley.obrey@nhlchi.org	15. Phone (808) 521-2302	16. Fax n/a

C. SUBJECT MATTER

17. Board Action Being Contested

Nā Moku contests the issuance of revocable permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC, for the Development, Diversion, and Use of Surface Water . . .

18. Board Action Date

December 13, 2024

19. Item No.

D-9

20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case

21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection

Please see attached.

22. Any Disagreement Petitioner May Have with an Application before the Board

Please see attached.

23. Any Relief Petitioner Seeks or Deems Itself Entitled to

Nā Moku requests the completion of a Ka Pa'akai analysis along with several amendments to the conditions of the revocable permit

24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

Please see attached.

25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Please see attached. See also Nā Moku Aupuni O Ko'olau Hui v. Bd. of Land and Nat. Res., Civ. No. 16-1-0052-01 (JPC); In re Waikamoi 128 Hawai'i 497, 291 P.3d 395 (App. 2012); Carmichael v. Bd. of Land and Nat. Res., 150 Hawai'i 547, 506 P.3d 211 (2022)

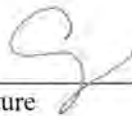
☒ Check this box if Petitioner is submitting supporting documents with this form.

☒ Check this box if Petitioner will submit additional supporting documents after filing this form.

Ashley K. Obrey

Petitioner or Representative (Print Name)

Signature



December 19, 2024

Date

The following pages supplement and are a part of Nā Moku Aupuni O Ko‘olau Hui’s petition for a contested case hearing. Nā Moku incorporates its testimony submitted for the December 13, 2024 Board of Land and Natural Resources meeting as well as any previous petitions, filings, and testimony submitted to the Board related to the issuance, renewal, and/or holdover of revocable permits and the issuance of a long term lease or license to Alexander & Baldwin, Inc. and East Maui Irrigation, LLC (and/or their predecessors).

The Board should have in its records a copy of the Environmental Court’s January 2, 2024 Order Granting in Part and Denying in Part Appellant Nā Moku Aupuni O Ko‘olau Hui’s Motion for Ruling and Request for Alternative Relief. *See Nā Moku Aupuni O Ko‘olau Hui v. Bd. of Land and Nat. Res., et al.*, Civ. No. 16-1-0052-01 (JPC), Dkt. 102 (also attached). There, the court concluded that “Nā Moku was improperly denied its right to a contested case hearing[,] concluding that Nā Moku’s members asserted traditional and customary Native Hawaiian rights and practices, protected by Article XII, Section 7 of the Hawai‘i Constitution, which constitutes a property interest for purposes of a due process analysis in determining whether a hearing was required . . . and independently finds it was a violation not to allow a contested case hearing.” *Id.* at 6. It also held that BLNR violated the public trust doctrine and failed to identify Native Hawaiian traditional and customary practices “by making no effort to identify native Hawaiian practices impaired by the continuation of the RPs.” *Id.* at 7. The Board is collaterally estopped from arguing that Nā Moku does not have a right to a contested case hearing.

Nā Moku is an organization comprised of descendants of the Ke‘anae-Wailuanui Ahupua‘a (land division) within the Ko‘olau District who can trace their genealogical lineage to the original settlers (*i.e.*, ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778) and their spouses. Nā Moku’s mission includes,

among other things, to “[e]nhance, preserve, and protect the quality of life and environment for the descendants and tenants of Keanae-Wailuanui Ahupua‘a as it has existed since time immemorial.” Its members include Native Hawaiians who engage in traditional and customary practices on a number of streams in East Maui. Nā Moku’s interests are directly affected by the issuance of another revocable permit authorizing more water to be diverted in 2025. Nā Moku’s members are kalo farmers, fishers, and gatherers who depend on the streams covered by the permit for growing taro and feeding their families. Nā Moku’s members have seen streams run dry for long periods as a result of A&B/EMI’s diversions. Approval of the permits for 2025 will adversely impact members’ ability to continue to engage in and perpetuate their traditional practices that depend on free-flowing streams: gathering aquatic life, fishing, growing kalo, and transmitting traditional knowledge to future generations.

Without the BLNR’s affirmative vote to issue such a permit, A&B/EMI could not take **any** water from streams flowing through the areas covered by the revocable permit for its (and Mahi Pono’s) private, commercial use.

Na Moku’s rights are constitutionally protected

Native Hawaiian rights are protected by Article XII § 7 of the Hawai‘i State Constitution. *Pele Defense Fund v. Paty*, 73 Haw. 578, 616-621, 837 P.2d 1247 (1992); *Public Access Shoreline Hawai‘i v. Hawai‘i Cty. Planning Comm’n*, 79 Hawai‘i 425, 442, 881 P.2d 1246, 1263 (1995)(“*PASH*”). The State Constitution provides that the:

State shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. Art. XII § 7. Native Hawaiians exercising traditional and customary practices enjoy a constitutionally-protected right. *See PASH*, 79 Hawai‘i at 442, 450-51, 881 P.2d at 1263, 1271-72.

The Hawai‘i Supreme Court has held that Native Hawaiian rights are property interests protected by the due process clause of Article I, § 5 of the Hawai‘i Constitution. *See, e.g., Flores v. Bd. Of Land and Nat. Res.*, 143 Hawai‘i 114, 125-26, 424 P.3d 469, 480-81 (2018) (citing *Mauna Kea Anaina Hou v. Bd of Land & Natural Res.*, 136 Hawai‘i 376, 390-91, 363 P.3d 224, 238-39 (2015) (recognizing “the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, [and] the risk of an erroneous deprivation” and holding that “due process requires that the parties be given a meaningful opportunity to be heard”); *Kaleikini v. Thielen*, 124 Hawai‘i 1, 43, 237 P.3d 1067, 1109 (2010) (as recognized in the concurrence, “Petitioner’s hearing was ‘required by law’ under [her] constitutional due process right as a Native Hawaiian practicing the native and customary traditions of protecting iwi”); *In re ‘Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*, 128 Hawai‘i 228, 239-41, 287 P.3d 129, 140-42 (2012) (holding that when traditional and customary practices may be adversely affected, practitioners are entitled to a contested case hearing).

Courts have also previously determined that Nā Moku had the right to a contested case hearing in other matters affecting their traditional and customary practices related to East Maui streams. *See Nā Moku Aupuni O Ko ‘olau Hui v. Bd. of Land and Nat. Res., et al.*, Civ. No. 16-1-0052-01 (JPC), Dkt. 102 (holding, among other things, that Nā moku had a right to a contested case hearing); *see also In re Petition to Amend Interim Instream Flow Standards for Waikamoi*, 128 Hawai‘i 497, 291 P.3d 395 (App. 2012)(holding that, because a decision of the Commission on Water Resource Management would determine individual water rights and traditional and

customary practices by limiting Native Hawaiians' access to water, a contested case hearing was required).

Additionally, Article XI, § 9 of the Hawai'i State Constitution states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. (Emphasis added).

“[T]he people of this state have elevated the public trust doctrine to the level of a constitutional mandate.” *In Re Water Use Permit Applications*, 94 Hawai'i 97, 1131, 9 P.3d 409, 443 (2000) (“*Waiāhole*”); *see also id.* at 1131-32, 9 P.3d at 443-44 (“We therefore hold that article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i.”). Our constitution and courts emphasize “the right of the people to have the waters protected for their use.” *Id.* at 146, 9 P.3d at 458; *see also Pele Def. Fund v. Paty*, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992) (holding that the citizens of the state “must have a means to mandate compliance” with the public trust). Native Hawaiian practices are also a protected public trust purpose under Article XI § 1 of the Hawai'i Constitution. *See Waiāhole*, 94 Hawai'i at 137, 9 P.3d at 449 (“[W]e continue to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.”) (citing Haw. Const. art. XII, § 7, *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982), and *PASH*, 79 Hawai'i 425, 903 P.2d 1246).

On January 1, 2025, A&B/EMI would have had no legal authority to divert up to 40 millions of gallons of water every day from East Maui streams. Thus, the BLNR's December 13, 2024 vote to issue a revocable permit to A&B/EMI granted legal rights and privileges to a

private diverter that impact the rights of traditional and customary practitioners despite their objections.

How Nā Moku's Participation in the Proceeding Would Serve the Public Interest

Not only is water held in trust for the public, but the Hawai'i Supreme Court has declared that "the rights of native Hawaiians are a matter of great public concern in Hawai'i." *Ka Pa 'akai O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000); *see also Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455 (mandating that trustees "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."); *State v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) ("Under public trust principles, the State as a trustee has the duty to protect and maintain the property and regulate its use."); *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 226, 140 P.3d 985, 1006 (2006) (recognizing "an affirmative duty to preserve and protect the State's water resources"). Nā Moku's participation in this case would help to ensure that the Board upholds its kuleana to (1) the public in the protection of our trust resources as well as to Native Hawaiians, whose traditional and customary practices are protected by the state constitution. *See* Haw. Const. Art. XII, § 7; Art. XI, §§ 1 & 9.

This year's revocable permit raised issues related to waste and ability to use groundwater in lieu of diverting surface water. A contested case hearing would allow the parties to put forth evidence, cross examine witnesses, and develop a complete record, giving the Board an opportunity to do a thorough analysis of the evidence and impacts and to make specific findings of fact to support its decision. This could not be accomplished at the December 13, 2024 board meeting.

Nā Moku intends to raise issues related to Haw. Const. Art. XII § 7; Haw. Const. Art. XI, §§ 1 & 9; Hawai‘i Revised Statutes chapters 7, 343, 171, and 205A.

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Attorney for Appellant
NĀ MOKU AUPUNI O KO'OLAUI HUI

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

NĀ MOKU AUPUNI O KO'OLAUI HUI,)	Civil No. 16-1-0052-01 JPC
	)	(Environmental Court)
Appellant,)	
	)	DLNR File No. 01-05-MA
vs.)	
	)	ORDER GRANTING IN PART AND
BOARD OF LAND AND NATURAL	)	DENYING IN PART APPELLANT NĀ MOKU
RESOURCES, DEPARTMENT OF LAND	)	AUPUNI O KO'OLAUI HUI'S MOTION FOR
AND NATURAL RESOURCES, DAWN	)	RULING AND REQUEST FOR
N.S. CHANG, in her official capacity	)	ALTERNATIVE RELIEF
as Chairperson of the Board of Land and)	
Natural Resources, ALEXANDER &)	
BALDWIN, INC., EAST MAUI)	
IRRIGATION CO., LTD., COUNTY OF)	
MAUI DEPARTMENT OF WATER	)	HEARING:
SUPPLY, HAWAII FARM BUREAU	)	Date: November 6, 2023
FEDERATION, and MAUI TOMORROW,	)	Time: 1:30 p.m.
	)	Judge: Honorable Jeffrey P. Crabtree
Appellees.)	

**ORDER GRANTING IN PART AND DENYING IN PART APPELLANT
NĀ MOKU AUPUNI O KO'OLAUI HUI'S MOTION FOR
RULING AND REQUEST FOR ALTERNATIVE RELIEF**

This case arises from Appellee Board of Land and Natural Resources' ("BLNR's") approvals of four revocable permits which authorized the diversion of over 100 million gallons of water a day out of East Maui streams and the use of 33,000 acres of state ceded lands. The water was diverted for various uses—some public uses but mostly for private agriculture (sugar cane until sugar cane was phased out).

In 2001, the RPs were placed in “holdover” status by BLNR, whereby the permits were essentially rolled over from year to year rather than undergoing any meaningful review. After the BLNR made its decision to continue the permits in 2014 for the 2015 calendar year, Appellant Nā Moku Aupuni O Ko‘olau Hui (“Nā Moku”) filed an original action in the circuit court, alleging that the renewal of A&B/EMI’s RPs constituted applicant action proposing the use of State land and required the preparation of an environmental assessment under Hawai‘i Revised Statutes (“HRS”) Chapter 343. *See Carmichael v. Bd. of Land and Nat. Resources*, 150 Hawai‘i 547, 555-57, 506 P.3d 211, 220-21 (2022).

The instant case challenged the BLNR’s December 11, 2015 decision re-affirming the holdover status of the RPs for calendar year 2016. More specifically, it alleged that BLNR violated legal requirements by (1) improperly holding over the permits and maintaining the status quo without meaningful annual review under HRS chapter 343, HRS chapter 205A, and Article XII §7 of the Hawai‘i State Constitution and *Ka Pa‘akai Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 45, 7 P.3d. 1068, 1082 (2000), among other things, and (2) failing to conduct the contested case hearing requested by Nā Moku.

After this appeal was filed, the circuit court in *Carmichael* ruled that BLNR’s holdover of the permits in 2014 violated HRS chapter 171. That ruling was appealed, and the instant case was “stayed pending the entry of final judgment on appeal in [*Carmichael*].” Dkt. 56

On March 3, 2022, the Hawai‘i Supreme Court issued a decision in *Carmichael*. Judgment on appeal was entered on March 20, 2023.

On October 13, 2023, Nā Moku filed its Motion for Ruling and Request for Alternative Relief, Dkt. 71, asking this court to:

- (1) Reverse BLNR’s December 11, 2015 decision reaffirming the holdover status of the RPs for calendar year 2016;
- (2) Determine that A&B had no right to take any water;
- (3) Enter an order in this case that caps the amount of water that can be taken from the East Maui streams at 31.5 MGD until a contested case hearing is held at which Nā Moku is allowed to participate. In other words, Nā Moku asks the court to take the diversion cap it ordered in *Sierra Club v. BLNR*, 1 CCV-22- 0001506) and order it in this case also; and
- (4) Allow Nā Moku to intervene in a contested case hearing the court already ordered in *Sierra Club v. BLNR*, 1 CCV-22-0001506 (which presumably will help set stream diversion limits for calendar year 2024).

On October 26, 2023, Appellee County of Maui Department of Water Supply filed its statement of no position. Dkt. 82. On October 27, 2023, BLNR and A&B/EMI filed their respective memoranda in opposition to the motion. Dkts. 84 & 89. On November 1, 2023, Nā Moku filed its reply brief.

The hearing on the motion was held on November 6, 2023. Present at the hearing were Ashley K. Obrey for Nā Moku, Deputy Attorney General Miranda Steed for BLNR, Trisha Akagi and Mallory Martin for A&B/EMI, and Bradley Sova (via Zoom) for County of Maui Dept of Water Supply

I. The Mootness Issue

BLNR and A&B/EMI argue this entire case is moot because of the *Carmichael* decision. Due to time constraints, the court will not summarize all the arguments in the briefing on this motion. The main argument is that *Carmichael*'s invalidation of BLNR's 2014 continuation of the hold-over RPs applies to all hold-over RPs, including BLNR's 2015 continuation for calendar year 2016 (the focus of this case). It is not contested that the RPs for the instant case are invalid under the reasoning of *Carmichael*. However, additional grounds were argued in this case which were not argued in *Carmichael*. Despite these distinctions, BLNR and A&B/EMI argue that since holdover RPs are invalid, this entire case is moot because no exception to the mootness doctrine applies. The court respectfully disagrees and hereby holds that not all of Nā Moku's arguments back in 2016 are moot simply because one ground for relief (the holdover RPs) was decided in *Carmichael*. The court's reasons are as argued by Nā Moku— essentially that other bases for relief were not decided in *Carmichael* and these issues are capable of repetition while evading review, and therefore the public interest exception applies. *See* Dkt. 91 at 4-6. If the trial court too willingly finds cases moot, it is much more difficult for an appellate court to issue whatever decisions and guidance it thinks is appropriate.

II. Nā Moku's Request for Reversal of BLNR's December 11, 2015 Decision Reaffirming the Holdover Status of the RPs for Calendar Year 2016

This request is GRANTED for the following reasons which go beyond *Carmichael*, together with reasons stated in other parts of this ruling:

A. Nā Moku Was Improperly Denied Its Right to a Contested Case Hearing

Back in 2016, Nā Moku argued it was improperly denied the right to a contested case hearing. The court first notes Judge Castagnetti ordered a contested case hearing back in 2016. *See* Dkt. 91, Exh. A. This court agrees for reasons including those stated in Nā Moku's Reply Brief—that is that Nā Moku's members asserted traditional and customary Native Hawaiian rights and practices, protected by Article XII, Section 7 of the Hawai'i Constitution, which constitutes a proper interest for purposes of a due process analysis in determining whether a hearing was required, *see* Dkt. 91 at 2-3—and independently finds it was a violation not to allow a contested case hearing. Further to the mootness issue, this court has seen BLNR's deny multiple requests for contested case hearings, so this issue is clearly capable of repetition. Review has also been evaded because BLNR has not been able to promptly hold a contested case hearing when ordered to. When we are dealing with one-year permits, this delay is a real problem, and it is now apparent to the court that what it once saw as moot is not moot. A clear issue exists where the permit "cannot stand" for lack of a contested case hearing. *See Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015)). Yet, BLNR argues the court exceeds its authority by stepping into the breach created when BLNR issues defective permits for lack of a contested case hearing, and then it takes BLNR substantial time to hold a contested case hearing, and by then the next year's permits are due or overdue. The phrase that comes to mind is "justice delayed is justice denied," and not "justice delayed is moot." Bottom line: the denial of Nā Moku's request for a contested case hearing was a breach as claimed back in 2016, and it should be recognized in this case even if a contested case hearing for the calendar year 2016 can no longer be held.

B. BLNR Failed to Make Findings

Back in 2016, Nā Moku argued BLNR violated the Hawai'i State Constitution and HRS § 171-55. The basis was BLNR's failure to make findings of fact or conclusions of law that the continuing diversions were in the best interests of the state due to BLNR's lack of any meaningful review by allowing the permits to keep holding-over. The court agrees and so rules for the reasons stated in Nā Moku's Reply Brief—that is, that "BLNR should have determined—but did not—that the RPs were 'in the best interests of the State' before continuing them in 2014." Dkt. 91 at 3 (citing *Carmichael*, 150 Hawai'i at 566, 506 P.3d at 230; *see also id.* at 564, 506 P.3d at 228 ("Because the BLNR did not make factual findings or enter conclusions of law

positing that the permits served the State's best interests, the BLNR failed to demonstrate that it properly exercised the discretion vested in it by the constitution and the statute.")). This issue was a breach as claimed and it should be recognized in this case despite BLNR's claim that it is moot because it no longer issues permits without meaningful review.

C. BLNR Violated the Public Trust Doctrine

Back in 2016, Nā Moku argued BLNR violated the public trust doctrine when it re-affirmed the holdover status of the RPs. The gist of this argument was that private commercial use of public trust assets like stream water is not necessarily a protected use of trust assets. The court agrees and so rules for the reasons stated in Nā Moku's Reply Brief—that is, that BLNR failed to “take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process[,]” as well as ignored the public trust doctrine mandates that BLNR “assure that the waters of our land are put to reasonable and beneficial uses” and “preserve the rights of present and future generations in the waters of the state.” Dkt. 91 at 3-4 (citing *Kauai Springs v. Planning Comm'n*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014); *Carmichael*, 150 Hawai'i at 566 n.33, 506 P.3d at 230 n.33 (noting that “private commercial use” is not “a protected public trust purpose.”)). This was a breach as claimed, and it should be recognized in this case. Further to the mootness argument, this issue not only could clearly arise in the future, it is currently arising regularly in the context of balancing the constitutional/public trust doctrine of Mahi Pono's diversified farming operations on Maui, which also implicate Article XI, Section 3 of the Hawai'i Constitution (conserve and protect agricultural lands and promote diversified agriculture). Time will tell if the issue is capable of repetition while evading review, but it is certainly possible.

D. BLNR Failed to Identify Native Hawaiian Traditional and Customary Practices

Back in 2016, Nā Moku argued BLNR breached its duty under Article XII, § 7 of the Hawai'i Constitution and case law by making no effort to identify native Hawaiian practices impaired by the continuation of the RPs. The court agrees and finds and concludes that BLNR did not do so. Further to the mootness argument, this issue clearly can arise again and can evade review, such as if a Native Hawaiian rights organization is denied standing, but a decision on appeal will come too late to allow the relief sought. The importance of recognizing Native

Hawaiian rights to stream water should not be diluted by calling the issue moot. This was a breach as claimed and it should be recognized in this case.

E. BLNR Violated HRS Chapter 205A

Back in 2016, Nā Moku argued BLNR breached its duties under HRS chapter 205A by not considering the values set by the Legislature in chapter 205A. It is clear that BLNR has an affirmative duty to consider these issues and simply did not do so when it affirmed the hold-over status of the RPs for calendar year 2016 without meaningful review. This was a breach as claimed and it should be recognized in this case.

In short, BLNR improperly authorized A&B to take water from the streams for 2016 when it denied Nā Moku's request for a contested case hearing, failed to make findings, breached its public trust duties, violated Article XII § 7, and violated HRS chapter 205A.

III. Nā Moku's Requests for Alternate Relief

A. Nā Moku's Request for Ruling that A&B/EMI "Had No Right to Take the Water"

The court denies this request for a potentially dispositive ruling without prejudice. It is correct to say BLNR improperly authorized A&B to take water from the streams. But to the court that is not the same thing as saying A&B had no right to take the water. When A&B/EMI took the water, it was "authorized" by law to take the water because of BLNR's permits. A finding that BLNR erred does not automatically mean A&B/EMI acted illegally. Nā Moku cites no persuasive legal authority that A&B/EMI as a matter of law had no right to take the water.

B. Nā Moku's Request for a Diversion Cap of 31.5 MGD

This request is denied. The court concludes that its equitable powers under HRS § 604A-2(b) do not give it the discretion to graft onto this case the 31.5 MGD cap ordered in *Sierra Club v. BLNR*, 1CCV-22-0001506. For the court's reasons, *see* A&B/EMI's memorandum in opposition to Nā Moku's motion. *See* Dkt. 89 at 12-16 (sections 2, 3, and 4).

C. Nā Moku's Request to Intervene in Upcoming Contested Case Hearing Ordered by this Court in *Sierra Club v. BLNR*, 1CCV-22-0001506.

The court denies this request. The contested case hearing ordered in *Sierra Club v. BLNR*, 1CCV-22-0001506 is an entirely different proceeding covering multiple issues that were not part of the allegations in this case back in 2016. The court is not aware whether the request is ripe, *e.g.*, (a) whether Nā Moku has requested its own contested case hearing to accompany the

contested case hearing Sierra Club obtained, or (b) whether Nā Moku asked to intervene in Sierra Club's contested case hearing. The court concludes its equitable powers under HRS § 604A-2(b) do not give the court discretion to order intervention in an entirely different case under these circumstances.

Dated: Honolulu, Hawai'i, January 2, 2024 2023.

/s/ Jeffrey P. Crabtree



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Miranda C. Steed

MIRANDA C. STEED, ESQ.

Deputy Attorney General

Attorney for BOARD OF LAND AND

NATURAL RESOURCES, DEPARTMENT

OF LAND AND NATURAL RESOURCES, and

DAWN N.S. CHANG, in her official capacity as

Chairperson of the Board of Land and Natural Resources

/s/ Trisha H.S.T. Akagi

TRISHA H.S.T. AKAGI, ESQ.

MALLORY T. MARTIN, ESQ.

Attorneys for ALEXANDER & BALDWIN, INC. and

EAST MAUI IRRIGATION CO., LTD

/s/ Mariana Löwy-Gerstmar

MARIANA LÖWY-GERSTMAR, ESQ.

Deputy Corporation Counsel

Attorney for COUNTY OF MAUI

DEPARTMENT OF WATER SUPPLY

Nā Moku Aupuni O Ko'olau Hui v. Board of Land and Natural Resources; Civil No. 16-1-0052-01 JPC; Order Granting In Part and Denying In Part Appellant Nā Moku Aupuni O Ko'olau Hui's Motion for Ruling and Request for Alternative Relief

AMENDED

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 13, 2024

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

MAUI

Issuance of Revocable Permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the Development, Diversion, and Use of Surface Water for Diversified Agriculture, Currently Existing Historical Industrial and Non-Agricultural Uses, Reservoir, Fire Protection, Hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park Purposes on the Island of Maui; Tax Map Keys: (2) 1-1-001:044 and 050, 1-1-002:002 (por.), 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017.

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

APPLICANT:

Alexander & Baldwin, Inc., a domestic profit corporation; and East Maui Irrigation Company, LLC, a domestic limited liability company; hereafter collectively referred to as "Applicant".

LEGAL REFERENCE:

Sections 171-13 and -55, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of government waters from streams located in the Koolau Forest Reserve situated at Hana, Maui, identified by Tax Map Keys: (2) 1-1-001:044 and 050, 1-1-002:002 (por.), 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017, as shown on the attached maps labeled **Exhibit A**.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: YES

as amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
December 13, 2024 KH

EXHIBIT B

CURRENT USE STATUS:

Encumbered by revocable permit Alexander & Baldwin, Inc. and East Maui Irrigation Company, Limited, for right, privilege and authority for the development, diversion, and use of water purposes.

CHARACTER OF USE:

Diversified agriculture, currently existing historical industrial and non-agricultural uses, reservoir, fire protection, hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park purposes.

COMMENCEMENT DATE:

January 1, 2025.

MONTHLY RENTAL:

\$23,598.00 per month.

COLLATERAL SECURITY DEPOSIT:

Twice the monthly rental.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

A Final Environmental Impact Statement (FEIS) was published in the Environmental Review Program's Environmental Notice on September 8, 2021, and accepted by the Board at its meeting on September 24, 2021 under agenda item D-7. The FEIS discussed in the Board submittal covers the state action contained in the permit. Therefore, under HAR 11-200.1-11(a) the Board is recommended to find that the existing FEIS covers the existing state action, the anticipated cumulative effects are similar or the same as the FEIS, and the FEIS already covers the range of alternatives to the proposed action. For reference, below are links to the FEIS and supporting documents:

https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-09-08-MA-FEIS-corrected-East-Maui-Water-Lease-Vol-1.pdf

https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-09-08-MA-FEIS-corrected-East-Maui-Water-Lease-Vol-2.pdf

https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-09-08-MA-FEIS-corrected-East-Maui-Water-Lease-Vol-3.pdf

https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-09-08-MA-FEIS-corrected-East-Maui-Water-Lease-Vol-4.pdf

https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-09-08-MA-FEIS-corrected-East-Maui-Water-Lease-Vol-5.pdf

DCCA VERIFICATION:

Place of business registration confirmed:	YES
Registered business name confirmed:	YES
Applicant in good standing confirmed:	YES

JUSTIFICATION FOR REVOCABLE PERMIT:

The purpose of this revocable permit is to continue existing uses of water currently allowed under revocable permits to the same Applicant entities. The revocable permit is temporary in nature intended to allow continuing existing uses of water until a long-term water license can be issued via public auction. Staff believes that it is in the State's best interest to issue a new single revocable permit to replace the current revocable permits for the reasons discussed further herein.

BACKGROUND:

The four current revocable permits for the diversion and use of East Maui surface waters have been in effect since 2001. Since that time, the revocable permits have been heavily modified by Board action, contested case decision and order, and court decisions. Rather than seek to continue the four revocable permits for 2024, staff believed that it would be in the best interest of the State to allow the four existing revocable permits to sunset as of December 31, 2023, and for the Board to authorize a single new revocable permit effective January 1, 2024 that consolidates all revocable permit requirements into the single revocable permit document. Staff believed that this would result in greater clarity and transparency and allow for the use of the most recent revocable permit standard form.

At its meeting on December 8, 2023, under agenda item D-8, staff presented the new single revocable permit to the Board for approval. The Board approved staff's recommendation as amended. The staff submittal can be accessed at the following link:

<https://files.hawaii.gov/dlnr/meeting/submittals/231207/D-8.pdf>

The draft Board meeting minutes for the item, including the amendments adopted, can be found on pages 15 and 16 of the document accessed at the following link:

<https://dlnr.hawaii.gov/wp-content/uploads/2024/07/Minutes-231207-D.pdf>

At that meeting, Sierra Club of Hawaii (Sierra Club) verbally requested a contested case hearing and submitted a written request on December 18, 2023. Staff will address the contested case request in a separate submittal. After review of the reports submitted by the Applicant (and current permittee) over the course of 2024, staff believes that further

amendments to the revocable permit are appropriate, so staff is recommending that the Board approve a new revocable permit effective January 1, 2025, subject to new and revised conditions discussed further herein. Accordingly, staff now brings this action before the Board.

DISCUSSION:

Staff recommends that the new revocable permit allow for the development, diversion, and use of water only, as authorized by the current revocable permit, resulting in no disposition of additional land areas. Currently, the Applicant pays a monthly rent for the revocable permit of \$23,000.00 (\$276,000.00 annually). Staff recommends that a monthly rent for 2025 revocable permit in the amount of \$23,598.00 (\$283,176.00 annually). This 2.9% increase reflects the unadjusted percent change in the Consumer Price Index from October 2023 to October 2024.

The Applicant also pays an annual amount of \$139,463.00 to contribute, either in funds or in-kind services, for watershed management activities in addition to rent for the year 2024. Staff is recommending that the Board require the same amount be contributed either in funds or in-kind services for watershed management activities in 2025 as a placeholder, pending further development of a watershed management agreement between the Division of Forestry and Wildlife (DOFAW) and the Applicant to apply to either the new revocable permit, a long-term water license, or both.

Staff is also recommending that as part of the new revocable permit, the Board adopt separate water diversion limits for the Applicant and the County of Maui. Staff believes that this will provide greater accountability and transparency for the respective uses, as well as encourage more efficient water use by all parties. For the Applicant, staff is recommending that the Board limit the diversion of water by the Applicant for their use for diversified agriculture, currently existing historical and non-agricultural uses, reservoir, fire protection, dust control, hydroelectric purposes, and other uses¹ to not exceed **3263 gallons per acre per day (gad) multiplied by the total amount of planted acreage used for diversified agriculture averaged monthly**. This amount is based on the median three-month average of the amount of water used daily by the Applicant for diversified agriculture between January and October of 2024, which were February, March and June of 2024.² The average amounts used for currently existing historical and non-agricultural uses, reservoir, fire protection, dust control, hydroelectric purposes, and other uses for those same months were also included. The average amount of water diverted by the Applicant from streams on privately owned land and not subject to the revocable permit for those months were subtracted; then the remainder amount was divided by the average total planted acreage through October 2024. The following table illustrates how the amount was calculated:

¹ “Other uses” includes system losses and other water diverted for use by the Applicant, excluding any water diverted for use of the County of Maui Department of Water Supply and Kula Agricultural Park.

² Staff believes that it is most appropriate to use the median three months due to the variability in water usage that resulted from the annual average.

Median three-month average amount of water used by Applicant for: - diversified agriculture - historical and non-agricultural uses - reservoir - fire protection - dust control - hydroelectric purposes - other uses including system losses	34.92 mgd
Less the median three-month average amount of water diverted by Applicant from streams located on private land.	-0.85 mgd
TOTAL	= 34.07 mgd
Estimated year-to-date planted acreage through October 31, 2024	/10,442 acres
Maximum daily allocation averaged monthly (multiplied by the current total planted acreage as adjusted)	= 3263 gad

Staff recommends that rather than establish a fixed total maximum amount allowed to be diverted under the revocable permit, the Board approve a variable total amount equal to the allocation of 3263 gad multiplied by the current total planted acreage. As more acreage is planted, the maximum amount of water allowed to be diverted would increase accordingly. This would alleviate the need to conjecture how much acreage will be planted in 2025. Staff would be able to ensure compliance by reviewing the monthly water use reports that would indicate the total amount diverted and then dividing by the total planted acreage to determine whether the Applicant is in compliance with the 3263 gad limit. Copies of the most recent quarterly water use report through September 2024, and the most recent monthly water use report from October 2024 are attached as **Exhibits B and C** respectively.

Staff notes that the Applicant uses groundwater pumped from its privately owned wells to supplement its operational water needs. However, Staff is not factoring in any groundwater use in the calculation of the water allocation. After consultation with the Commission of Water Resource Management (CWRM), Staff was informed that the use of groundwater for non-potable uses such as irrigation is not a highest and best use of groundwater consistent with CWRM's Water Resource Protection Plan (WRPP).³ Therefore, although the Applicant's use of groundwater is not regulated by the Board, Staff does not support an allocation of less surface water under the revocable permit that would, either directly or indirectly, result in a greater use (i.e., to make up the shortfall) of groundwater that would be contrary to CWRM's WRPP.

Pursuant to CWRM's analysis, under current Interim Instream Flow Standards (IIFS), approximately 56 mgd is estimated to be available for the East Maui transmission system

³ CWRM noted that it is more appropriate to use surface water for crop irrigation.

at median flows. Staff notes that this should not be construed as a fixed cap on the amount of water that can be diverted under the revocable permit. This estimate is based at median flows, meaning that there may be greater or lower amounts of water available, depending on stream conditions. In the event that stream conditions do not allow for the maximum amount of water allowed under the revocable permit to be diverted, then the Applicant shall be required to reduce its diversions to comply with the IIFS. Staff consulted with CWRM staff and was informed that the Applicant diversion of water was compliant with the IIFS. CWRM staff also noted that the Applicant was working in good faith to obtain numerous regulatory approvals to remove outstanding diversions in the Huelo region to comply with the 2022 IIFS decision.

As for uses by the County of Maui, the Board is recommended to allow the diversion of water from East Maui state-owned streams that shall not exceed **5.0 mgd, averaged monthly**, for use by the Department of Water Supply and **1.0 mgd, averaged monthly**, for use by the Kula Agricultural Park for total collective limit of **5.0 mgd, averaged monthly**. Staff notes that since January 2024 until October 2024, the County of Maui has an overall average use of 2.01 mgd for the Department of Water Supply and 0.55 mgd for the Kula Agricultural Park. Furthermore, staff notes that during that same period, the monthly average use by the Department of Water Supply never exceeded 4.0 mgd and the monthly average use by the Kula Agricultural Park never exceeded 1.0 mgd. Staff believes that the recommended limits provide enough water to meet the County's needs and also incentivize the County to more efficiently use of the water diverted on its behalf such as expand storage capacity. Also, it will reduce the amount of water currently diverted for the County (total of 7.5 mgd), leaving an additional 2.5 mgd of water in the streams to support stream habitat and instream uses.

Staff recommends that pursuant to the allocation of water to the County of Maui under the revocable permit, the Board require the County of Maui assume responsibility for organizing and scheduling monthly meetings of the interim committee to discuss water usage issues in the areas where the streams that water may be diverted from under this revocable permit are located, consisting of eight members, representing EMI/Mahi Pono, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the Huelo Community Association, the Sierra Club, Na Moku Aupuni O Ko'olau Hui and the County of Maui. Given the County of Maui's prior statements regarding their desire to work with interested stakeholders on a disposition of the long-term license, Staff believes it is appropriate for the County to take a lead role in these discussions. Issues to be covered at the meetings shall include but are not limited to: implementing CWRM orders, reducing water losses, water needed by the County of Maui for the Kamaole Treatment Plant and the Kula Agricultural Park, and water reservations for the Department of Hawaiian Home Lands.

For the 2024 revocable permit, the Board approved allocations based on an annual average, rather than a monthly average that had been adopted in past years. Staff recommends that the Board return to a monthly average standard. Staff believes that although this may be more challenging to the Applicant, it is more appropriate to return to using a monthly average to ensure compliance. As of October 2024, the Applicant has diverted a total year

to date average of 32.49 mgd, which currently is lower the Board approved 38.25 mgd total annual average for the Applicant's use in 2024. As the Applicant has two months remaining, staff cannot confirm that the Applicant will be compliance for the entire year prior to the Board making a decision on the new revocable permit for 2025.

In addition to the foregoing, staff recommends that the Board adopt the following additional conditions that were implemented by the Board for the current revocable permits and modified to conform with the requested revocable permit:

- (1) There shall be no waste of water. System losses and evaporation shall not be considered as a waste of water provided that system losses do not exceed 22.7%.⁴ The rate of system losses shall be calculated as the amount of water diverted or extracted into the Mahi Pono field system that is not used for diversified agriculture purposes, excluding the amount of water diverted for the County of Maui; then divided by the total amount of water diverted or extracted into the Mahi Pono field system.
- (2) Any amount of water diverted under the revocable permit shall be for reasonable and beneficial uses consistent with the character of use and always in compliance with the interim instream flow standards (IIFS), as may amended from time to time by CWRM. The Permittee shall also comply with all other conditions required by CWRM regarding the streams that water may be diverted from under this revocable permit, including stream flow restoration and closure of diversions.
- (3) Permittee shall provide a report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the revocable permit term.
- (4) Permittee shall continue to clean up and remove debris from the areas where the streams that water may be diverted from under this revocable permit are located, and staff shall inspect and report every three months on the progress of the clean-up. For purposes of clean-up, debris shall not include any structure and equipment that is either currently used for the water diversions, or for which CWRM has not required removal; "trash and debris" shall be defined as "any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)."
- (5) The revocable permit shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL).
- (6) Permittee shall coordinate with an interim committee to discuss water usage issues in the areas where the streams that water may be diverted from under this revocable permit are located. The committee shall consist of eight members, representing

⁴ Based on the information provided in the water use reports, Staff calculates the system loss rate based on year-to-date average amounts reported from January 2024 through October 2024 to be approximately 7.6%.

EMI/Mahi Pono, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the Huelo Community Association, the Sierra Club, Na Moku Aupuni O Ko`olau Hui and the County of Maui. The interim committee shall meet at least monthly. The County of Maui shall be responsible for organizing and scheduling these meetings.

- (7) It is an essential component to the Board's stewardship of the water resource to understand how much water is being diverted. Permittee shall therefore provide quarterly written reports to the Board of Land and Natural Resources (Board) containing (at a minimum) the following information:
- (a) The amount of water actually used on a monthly basis, including the monthly amount of water delivered for: the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses; and reservoir/fire protection/ hydroelectric uses. Descriptions of diversified agricultural uses shall also provide information as to acreage, location, crop, and use of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water;
 - (b) The estimated amount of water required for each crop per acre per day for the previous quarter and how much water is projected to be required per acre per day for the forthcoming quarter;
 - (c) The report shall disclose which structures on or next to streams have been removed, which ones have been modified, which ones remain to be modified, what remains to be done before they are modified, what impediments exist to their modification, what agencies need to give their approval before modifications can be made, when the Permittee made requests to the applicable agencies for approval and when the modifications are expected to be completed;
 - (d) Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including photographs and documenting any reports of such items that Permittee has received from the Department, other public or private entities and members of the general public and the action(s) taken by Permittee, if any, to remove the reported items;
 - (e) A listing of all reservoirs in the A&B/EMI water system serviced by the revocable permit, with the following information provided for each:
 - The capacity of each such reservoir;
 - The surface area of each such reservoir;
 - What fields are irrigated by each such reservoir;

- Which reservoirs are lined, and with what material, and which are not;
 - The estimated amount of evaporation per day from the surface of each such reservoir;
 - An analysis of the cost and time to line at least one such reservoir;
 - Information on any reservoirs planned to be taken out of service;
 - The depth and volume of water in each reservoir (as of the last day of each month);
 - How long it would take on average for each full reservoir to be emptied if no water were to flow into or be deliberately removed from it (i.e. how long until evaporation and seepage drains it); and
 - The amount of water used for hydroelectric purposes, if any.
- (f) The number, location, timing, and approximate acreage of fires fought during the quarter using water from reservoirs supplied with water from the A&B/EMI system;
- (g) The names and locations of the reservoirs from which water was drawn to fight fires during the quarter, and
- (h) A listing of all irrigation wells in the A&B/EMI water system serviced by the RPs, with the water levels and chloride levels in each well that is in active use noted, and

Each quarterly report shall be submitted in a format with tracked changes that clearly show the differences/ updates from the prior quarter.

Such quarterly reports shall be “due” to the DLNR one-month after the last calendar day of the subject quarter. Thus, the reports shall come due as follows:

Q1 Report—April 30, 2025

Q2 Report—July 31, 2025

Q3 Report—October 31, 2025

Q4 Report—January 31, 2026

- (8) In addition to the quarterly report, the Permittee shall provide monthly reports containing at minimum, the Permittee's monthly water use amounts and the total planted acreage.
- (9) Require Permittee to advise any third-party lessees, that any decisions they make are based on these month-to-month revocable permits for water unless or until a license is issued.
- (10) Permittee shall cooperate with CWRM and the Department's Division of Aquatic Resources (DAR) in facilitating studies, site inspections and other actions as necessary to address the streams that water may be diverted from under this revocable permit.
- (11) Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in its quarterly reports.
- (12) If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.
- (13) For water used for agricultural crops, Permittee is to estimate how much water is required for each crop per acre per day.
- (14) Permittee shall look into supplying the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, this would be considered a reasonable and beneficial and permitted use under the revocable permit.
- (15) No later than August 1, 2025, Permittee shall provide an updated plan to reduce system losses including planned system upgrades, specific measures to more efficiently use water, proposed implementation timeline, and estimates on the amount that system losses may be reduced.
- (16) Based on the 2018 CWRM Decision and the information presented here, the Board determines that reasonable beneficial use for diversified agriculture to Applicant under a month-to-month revocable permit on 30 days' notice is 3263 gad.
- (17) As a condition of the permit, the Permittee shall provide at least 5.0 mgd to the County of Maui daily, which is the amount the Board finds to be the reasonable and beneficial allocation of water.
- (18) Therefore, the total amount of water allocated under this revocable permit shall be:

- the amount of water equal to 3263 gad multiplied by the total amount of planted acreage to be used by the Permittee for diversified agriculture and other existing uses;
- 5.0 mgd to the County of Maui Department of Water Supply for the Kamaole Treatment Plant;
- 1.0 mgd for the County of Maui Kula Agricultural Park;

All of the above allocations shall be based on a monthly average.

Public Trust Doctrine and Carmichael Analysis

Title to water resources is held in trust by the State for the benefit of its people. Pursuant to *In re Water Use Permits*, 94 Hawaii 97, 9 P.3d 409 (2000) (*Waiāhole I*), and *In re Wai‘ola O Moloka‘i, Inc.*, 103 Hawai‘i 401, 83 P.3d 664 (2004) the Hawai‘i Supreme Court has identified four public trust purposes with respect to water:

1. Maintenance of waters in their natural state;
2. Domestic water use of the general public, particularly drinking water;
3. The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and
4. Reservations for Hawaiian home lands.

In addition, the courts have indicated that the “dual mandate” of the public trust not only calls for the protection of water resources, but also requires the Board to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state. *Waiāhole I*, 94 Hawai‘i at 139, 141, 9 P.3d at 451, 453 (“The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private off-stream purposes, including agriculture.”). In order to satisfy its public trust obligations, the Board must balance the proposed use of water against the foregoing public trust purposes, as well as competing uses.

Of these four purposes, domestic water use is implicated by the use of water by the County of Maui Department of Water Supply. In addition to its public trust duties, the Board also has a constitutional duty to promote diversified agriculture, which is the primary use of water under this revocable permit. With respect to the agricultural use of water, the Hawai‘i Constitution provides:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.

Hawai‘i Constitution, Article XI, Section 3.

The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.

Hawai‘i Constitution, Article XI, Section 10.

Pursuant to the Hawai‘i Supreme Court’s ruling in *Carmichael v. Board of Land and Natural Resources*, the Board may issue the revocable permit on a month-to-month basis for up to one year and continue the revocable permit for additional one-year periods.⁵ However, a decision by the Board to approve the subject revocable permit must demonstrate that such a decision is made in consideration of the “best interests of the State,” as required in section 171-55, Hawaii Revised Statutes (HRS), which states:

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will **serve the best interests of the State**, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

(Emphasis added.)

In staff’s view, making water available for diversified agriculture supports the long-term viability and security of local agricultural operations, and is both in the best interest of the State and critical to the State’s compliance with the constitutional mandates of Article XI. It also allows for the local production of food, supporting the goal of food sustainability and food security for Hawai‘i. It may also translate into lower prices for consumers when produce does not have to be shipped to Hawai‘i from outside of the state. Any tension between identified public trust uses of water and the constitutional mandates above will be resolved in the process of issuing water leases, because Section 171-58, HRS, requires the joint development of a water reservation to support current and future DHHL homestead needs.

Finally, approval of the revocable permit pursuant to staff’s recommendations would be consistent with legal requirements that they be temporary and under such conditions and rent which serve the best interest of the State. The Applicant has taken steps to convert their permits to long term leases, including working with the Department and DHHL regarding DHHL’s water reservations, seeking or obtaining an IIFS determination from

⁵ The Court noted that the Board may continue revocable permits for the temporary use of water pursuant to Section 171-55, HRS.

CWRM, and complying with Chapter 343, HRS, including preparation of a final environmental impact statement for the long-term water license. Additionally, the East Maui Water Authority (EMWA) has requested that it receive the license, which has been supported by the County of Maui through the Mayor. Given the numerous and complex issues regarding the issuance of a long-term disposition, staff recommends that the issuance of a new revocable permit for 2025 is in the best interest of the State to continue the reasonable and beneficial uses for diversified agriculture, specifically food production, and domestic purposes. Furthermore, Staff believes that based on prior statements, there is consensus among the interested stakeholders in this matter that a revocable permit for 2025 be approved to provide the parties time to discuss and resolve these issues.

RECOMMENDATION: That the Board:

1. Find that the existing Final Environmental Impact Statement (FEIS) covers the proposed revocable permit,
2. Based on the testimony and facts presented, find that approving the revocable permit, under the conditions and rent set forth herein, would serve the best interests of the State and is consistent with the public trust doctrine.
3. Authorize the issuance of a revocable permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC covering the subject waters for diversified agriculture, currently existing historical industrial and non-agricultural uses, reservoir, fire protection, hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - a. The standard terms and conditions of the most current revocable permit form, as may be amended from time to time;
 - b. Review and approval by the Department of the Attorney General; and
 - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State, including but not limited to the following:
 - (1) There shall be no waste of water. System losses and evaporation shall not be considered as a waste of water provided that system losses do not exceed 22.7%. The rate of system losses shall be calculated as the amount of water diverted or extracted into the Mahi Pono field system that is not used for diversified agriculture purposes, excluding the amount of water diverted for the County of Maui; then divided by the total amount of water diverted or extracted into the Mahi Pono filed system.

- (2) Any amount of water diverted under the revocable permit shall be for reasonable and beneficial uses consistent with the character of use and always in compliance with the interim instream flow standards (IIFS), as may amended from time to time by CWRM. The Permittee shall also comply with all other conditions required by CWRM regarding the streams that water may be diverted from under this revocable permit, including stream flow restoration and closure of diversions.
- (3) Permittee shall provide a report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the revocable permit term.
- (4) Permittee shall continue to clean up and remove debris from the areas where the streams that water may be diverted from under this revocable permit are located, and staff shall inspect and report every three months on the progress of the clean-up. For purposes of clean-up, debris shall not include any structure and equipment that is either currently used for the water diversions, or for which CWRM has not required removal; “trash and debris” shall be defined as “any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is).”
- (5) The revocable permit shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL).
- (6) Permittee shall coordinate with an interim committee to discuss water usage issues in the areas where the streams that water may be diverted from under this revocable permit are located. The committee shall consist of eight members, representing EMI/Mahi Pono, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the Huelo Community Association, the Sierra Club, Na Moku Aupuni O Koʻolau Hui and the County of Maui. The interim committee shall meet at least monthly. The County of Maui shall be responsible for organizing and scheduling these meetings.
- (7) It is an essential component to the Board’s stewardship of the water resource to understand how much water is being diverted. Permittee shall therefore provide quarterly written reports to the Board of Land and Natural Resources (Board) containing (at a minimum) the following information:

- (a) The amount of water actually used on a monthly basis, including the monthly amount of water delivered for: the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses; and reservoir/fire protection/ hydroelectric uses. Descriptions of diversified agricultural uses shall also provide information as to acreage, location, crop, and use of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water;
- (b) The estimated amount of water required for each crop per acre per day for the previous quarter and how much water is projected to be required per acre per day for the forthcoming quarter;
- (c) The report shall disclose which structures on or next to streams have been removed, which ones have been modified, which ones remain to be modified, what remains to be done before they are modified, what impediments exist to their modification, what agencies need to give their approval before modifications can be made, when the Permittee made requests to the applicable agencies for approval and when the modifications are expected to be completed;
- (d) Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including photographs and documenting any reports of such items that Permittee has received from the Department, other public or private entities and members of the general public and the action(s) taken by Permittee, if any, to remove the reported items;
- (e) A listing of all reservoirs in the A&B/EMI water system serviced by the revocable permit, with the following information provided for each:

The capacity of each such reservoir;

The surface area of each such reservoir;

What fields are irrigated by each such reservoir;

Which reservoirs are lined, and with what material, and which are not;

The estimated amount of evaporation per day from the surface of each such reservoir;

An analysis of the cost and time to line at least one such reservoir;

Information on any reservoirs planned to be taken out of service;

The depth and volume of water in each reservoir (as of the last day of each month);

How long it would take on average for each full reservoir to be emptied if no water were to flow into or be deliberately removed from it (i.e. how long until evaporation and seepage drains it); and

The amount of water used for hydroelectric purposes, if any.

- (f) The number, location, timing, and approximate acreage of fires fought during the quarter using water from reservoirs supplied with water from the A&B/EMI system;
- (g) The names and locations of the reservoirs from which water was drawn to fight fires during the quarter, and
- (h) A listing of all irrigation wells in the A&B/EMI water system serviced by the RPs, with the water levels and chloride levels in each well that is in active use noted, and

Each quarterly report shall be submitted in a format with tracked changes that clearly show the differences/ updates from the prior quarter.

Such quarterly reports shall be “due” to the DLNR one-month after the last calendar day of the subject quarter. Thus, the reports shall come due as follows:

Q1 Report—April 30, 2025

Q2 Report—July 31, 2025

Q3 Report—October 31, 2025

Q4 Report—January 31, 2026

- (8) In addition to the quarterly report, the Permittee shall provide monthly reports containing at minimum, the Permittee's monthly water use amounts and the total planted acreage.
- (9) Require Permittee to advise any third-party lessees, that any decisions they make are based on these month-to-month revocable permits for water unless or until a license is issued.
- (10) Permittee shall cooperate with CWRM and the Department's Division of Aquatic Resources (DAR) in facilitating studies, site inspections and other actions as necessary to address the streams that water may be diverted from under this revocable permit.
- (11) Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in its quarterly reports.
- (12) If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.
- (13) For water used for agricultural crops, Permittee is to estimate how much water is required for each crop per acre per day.
- (14) Permittee shall look into supplying the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, this would be considered a reasonable and beneficial and permitted use under the revocable permit.
- (15) No later than August 1, 2025, Permittee shall provide an updated plan to reduce system losses including planned system upgrades, specific measures to more efficiently use water, proposed implementation timeline, and estimates on the amount that system losses may be reduced.
- (16) Based on the 2018 CWRM Decision and the information presented here, the Board determines that reasonable beneficial use for diversified agriculture to Applicant under a month-to-month revocable permit on 30 days' notice is 3263 gad.
- (17) As a condition of the permit, the Permittee shall provide at least 5.0 mgd to the County of Maui daily, which is the amount the Board finds to be the reasonable and beneficial allocation of water.

- (18) Therefore, the total amount of water allocated under this revocable permit shall be:

the amount of water equal to 3263 gad multiplied by the total amount of planted acreage to be used by the Permittee for diversified agriculture and other existing uses:

5.0 mgd to the County of Maui Department of Water Supply for the Kamaole Treatment Plant;

1.0 mgd for the County of Maui Kula Agricultural Park;

All of the above allocations shall be based on a monthly average.

Respectfully Submitted,



Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Dawn N. S. Chang, Chairperson

RT

Land Board Meeting; December 13, 2024; D-9 Approved as amended.

Approved as amended. See attached page.

Land Board Meeting: December 13, 2024; D-9 Approved as amended.

Approved as amended. The Board amended conditions 6, 17 and 18 as follows: ⁴

- (6) ~~Permittee~~ The County of Maui shall coordinate with an interim committee to discuss water usage issues in the areas where the streams that water may be diverted from under this revocable permit are located. The committee shall consist of ~~eight members, representing~~ EMI/Mahi Pono, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the ~~Huelo~~ Haiku Community Association, the Sierra Club, Na Moku Aupuni O Ko'olau Hui ~~and~~ the County of Maui, the Department of Hawaiian Home Lands, the Aha Moku Advisory Council, and interested members of the Huelo community as determined by the County of Maui. The interim committee shall meet at least monthly. The County of Maui shall be responsible for organizing and scheduling these meetings.
- (17) As a condition of the permit, the Permittee shall provide ~~at least~~ no more than 5.250 mgd, averaged monthly, to the County of Maui daily, which is the amount the Board finds to be the reasonable and beneficial allocation of water.
- (18) Therefore, the total amount of water allocated under this revocable permit shall be:

the amount of water equal to 3263 gad multiplied by the total amount of planted acreage to be used by the Permittee for diversified agriculture and other existing uses, averaged annually less 1 mgd, and:

5.250 mgd to the County of Maui Department of Water Supply for the Kamaole Treatment Plant;

~~1.0 mgd for~~ and the County of Maui Kula Agricultural Park;

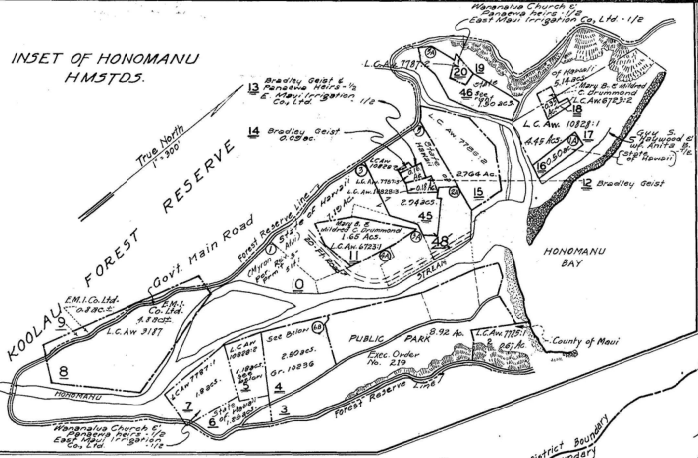
~~All of the above allocations shall be based on a monthly average.~~

The Board denied a written petition for a contested case from the Sierra Club and an oral request for contested case from the Native Hawaiian Legal Corporation on behalf of Na Moku Aupuni O Ko'olau Hui.

⁴ Deletions indicated by strikethrough and new material by underscoring.

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 SEP 30 1938
 OCT 2 1938
 NOV 1 1938
 DEC 1 1938
 JAN 25 1939
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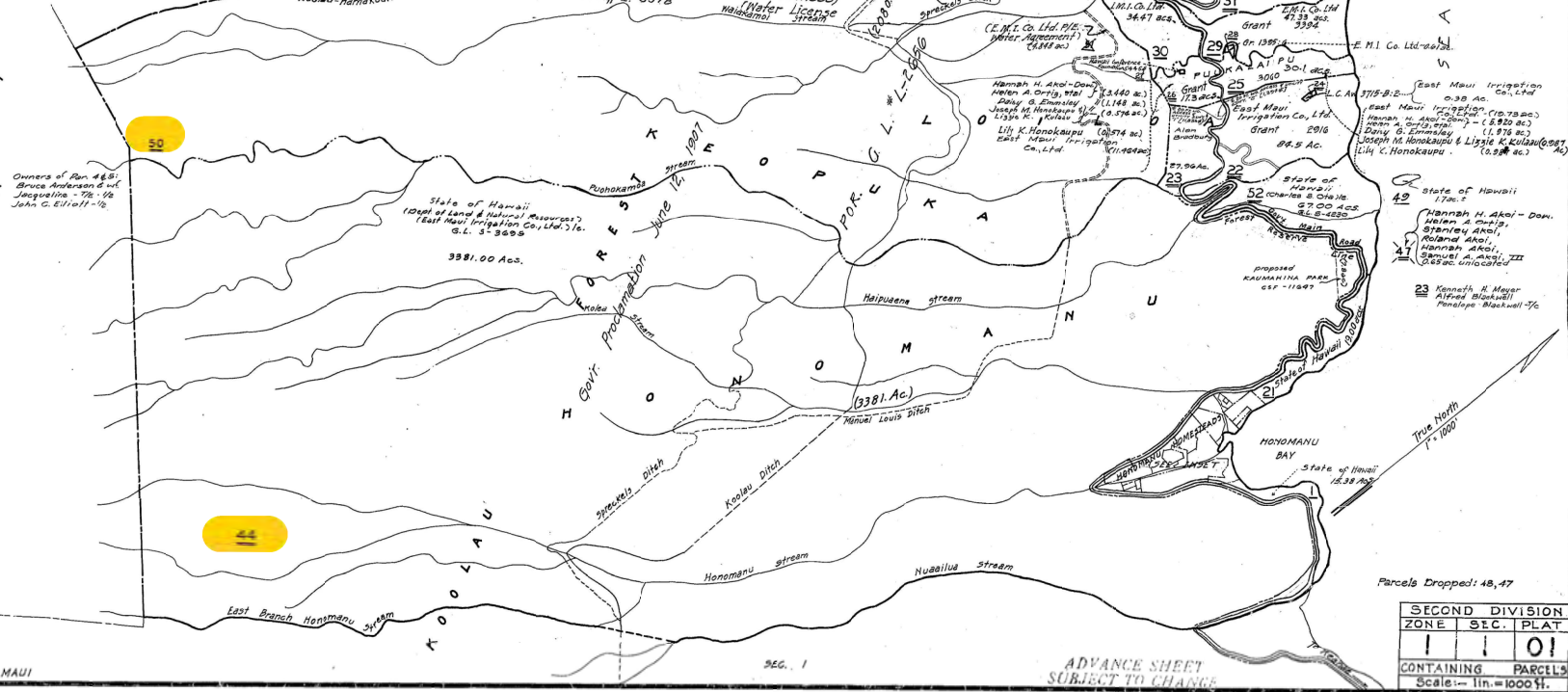
INSET OF HONOMANU
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46 State of Hawaii
 (Mauka Side)
 R.R. Pat. 5-
 5161

MAKAWAO DISTRICT
 WEST MAKAWAO
 ZONE 2 SEC. 9

MAKAWAO DISTRICT
 HONOMANU, HANA, MAUI



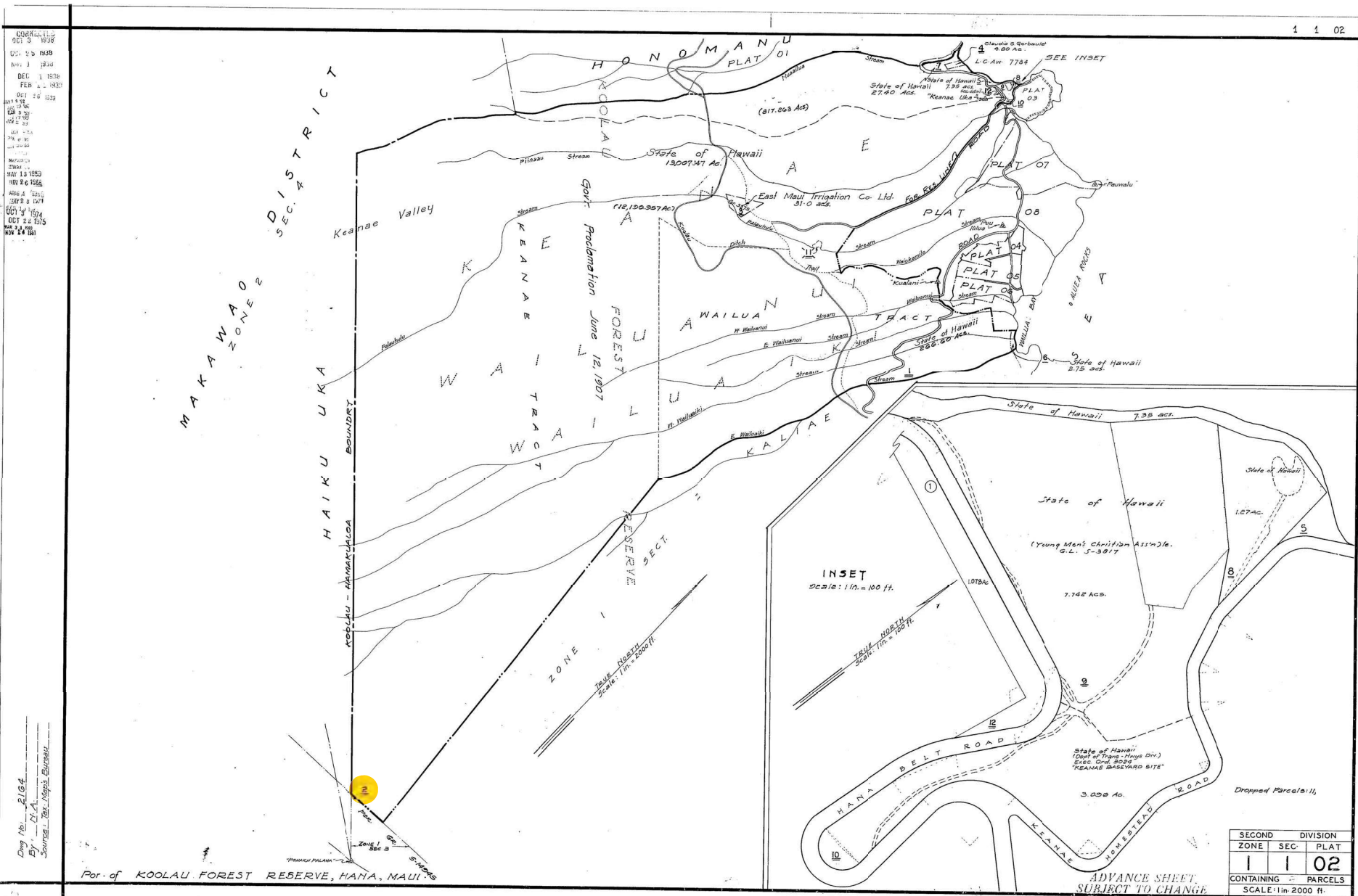
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Scale:-	1 in.=1000 ft.		

ADVANCE SHEET
 SUBJECT TO CHANGE

PRINTED

EXHIBIT A

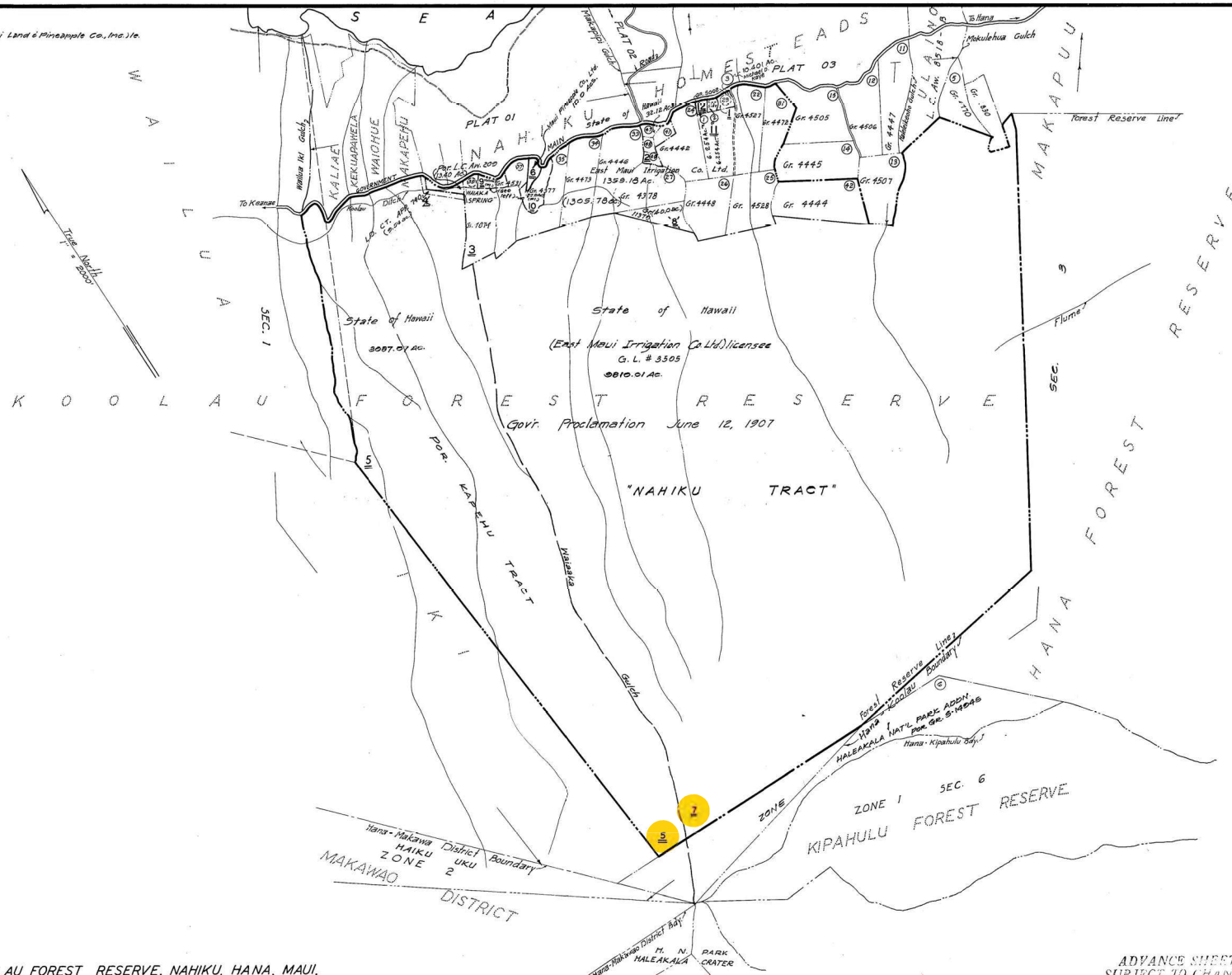


SECOND		DIVISION
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PRINTED

CORRECTED
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JAN 1 1939
SEP 1 1947

9&10 (Maui Land & Pineapple Co., Inc.)



PARCELS DROPPED: 8

SECOND	DIVISION
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SCALE: 1 in. = 2000 ft.	

ADVANCE SHEET
SUBJECT TO CHANGE

PRINTED

KOOLAU FOREST RESERVE, NAHIKU, HANA, MAUI.

Dwg. No. 2067

D. K. H. - June, 1934

By: The Maps Bureau, Inc.

Source: Survey Department

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JAN 16 1973
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OCT 15 1973
DEC 15 1973
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HAIKU - UKA

TAXATION MAPS BUREAU		
TERRITORY OF HAWAII		
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CONTAINING PARCELS		
SCALE: 1 in. = 1000 ft.		

PRINTED

EAST MAUI IRRIGATION COMPANY, LLC

P.O. BOX 791628, PAIA, MAUI, HAWAII 96779-1628 • (808) 579-9516

BLNR CONDITIONS FOR HOLDOVER OF EAST MAUI WATER PERMITS STATUS OF COMPLIANCE AS OF SEPTEMBER 30, 2024

CONDITIONS PER THE BLNR'S DECEMBER 7, 2023 DECISION

- 1. There shall be no waste of water. System losses and evaporation shall not be considered as a waste of water provided that system losses do not exceed 22.7%.***

Status: All diverted water is being put to beneficial agriculture use or municipal use, as the diverted water supplies the County of Maui for its Upcountry Maui water systems, the Kula Ag Park, Central Maui fire suppression needs, municipal users who do not currently have access to the County DWS delivery system, and agricultural uses in Central Maui on lands now owned and managed by Mahi Pono. Exhibit A notes system losses and evaporation as water uses, as they are an essential element of transporting water in an agricultural ditch system to the end users.

As of September 30, 2024, the planted acreage in Mahi Pono's East Maui fields totaled 10,587 acres. During Q3 2024, EMI diverted an average of 32.31 MGD. In Q3 2024, Mahi Pono continued focusing on the maintenance and growth of its existing crops and preparing new fields for scheduled plantings. The majority of the more than 250,000 trees ordered for planting this year arrived during Q3, and a supplemental final shipment arrived mid-October. As a result, plantings began at the end of Q3 and will continue through the end of the year as the young trees become field ready. The Permittees – and by extension, Mahi Pono – remain committed to the efficient use of East Maui stream water. Mahi Pono's total amount of water usage, together with that of the County of Maui, will not exceed the limits of the IIFS decisions at any point during its expansion.

- 2. Any amount of water diverted under the revocable permit shall be for reasonable and beneficial uses consistent with the character of use and always in compliance with the interim instream flow standards (IIFS), as may amended from time to time by CWRM. The Permittee shall also comply with all other conditions required by CWRM regarding the streams that***

EXHIBIT B

water may be diverted from under this revocable permit, including stream flow restoration and closure of diversions.

Status: See response to condition #1.

3. Permittee shall provide a report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the revocable permit term.

Status: All initial approvals of the stream diversion work permits have been received from the CWRM to abandon the diversions on the "taro streams" to fully restore their streamflow permanently, as voluntarily offered by EMI, over and above the requirements of the 2018 IIFS. The following is a summary of the status of those permits:

- Category 1 Permits – Original scope of work complete. Post-completion, CWRM requested small additional changes to the modifications based on community input. A final plan was submitted to CWRM for these modifications, which are intended to restore the streams to as natural a condition as reasonably possible. CWRM has met with East Maui community groups, and CWRM staff presented a final plan for which was approved by the CWRM at its meeting of January 30, 2024. This plan calls for additional removal of stream diversion structures. Permittee is working with consultants to obtain the necessary approvals/sign offs from the State Historic Preservation Division and the County of Maui Planning Department, which are required before work can begin. Other regulatory agency reviews/approvals, including the Army Corps of Engineers and the Office of Conservation and Coastal Lands, will be needed once those two agencies sign off.
- Category 2 Permits – Work completed in August 2023. The completion of this work has been verified by East Maui community groups and CWRM staff during a site visit conducted in Q4 2023.

2024 EAST MAUI WATER PERMIT
BLNR CONDITIONS: STATUS OF COMPLIANCE
AS OF SEPTEMBER 30, 2024
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- Category 3 Permits – Best Management Practice (BMP) Plans have been developed, and our consultants are finalizing plans for submittal to Department of Health. Required approvals and reviews from the State Historic Preservation Division, the County of Maui Planning Department, the Army Corps, and the Office of Conservation and Coastal Lands have been confirmed. Permittee will work with consultants to obtain these necessary approvals/sign offs. Work is pending receipt of all needed approvals. In the first two quarters of 2024, heavy rain in East Maui prevented several scheduled site clearings that are necessary to facilitate design work for the BMPs. The rainy weather from previous quarters cleared in Q3, thus allowing for site clearing and subsequent visits to be completed.
- Category 4 Permits – Original scope of work complete. CWRM conducted a site visit in Q1 2024 to verify the completion of work. The Permittees are pending a formal confirmation by CWRM in the near future.

The Permittees have also initiated discussions with CWRM staff on IIFS compliance for the 'non-taro streams' that were part of the 2018 IIFS decision. A draft work plan was submitted to CWRM for 41 diversions on 17 additional streams that are implicated by the 2018 IIFS decision. Before issuing the needed permits to undertake the work, CWRM will need to conduct site visits to each diversion site. CWRM's process of visiting each site is currently ongoing. While that process is ongoing, the Permittees comply with the IIFS decision regarding instream flow requirements (i.e., by individual streams and the total quantity of flow). This compliance is subject to CWRM staff verification. CWRM most recently verified IIFS compliance during a community site visit in June 2024, and an additional site visit in October 2024. Connectivity requirements of the IIFS decision are being met to the extent possible without the physical modifications that require governmental reviews and approvals. The draft work plan transmitted by the Permittees to the CWRM does address means of achieving full connectivity compliance for these additional non-taro streams.

As to the pipe issue, this permit condition was initially imposed in 2018, and we believe it relates to a pipe at Pualoa (aka Puolua) Stream at the Lowrie Ditch. In

a previous status report, we reported that the pipe had been extended to provide wetted pathways for the movement of stream biota on Pualoa Stream. At the 2018 BLNR hearing on the subject RP's (for 2019), statements were made that the pipe needs to be extended further to go under the road and that two 4" rusted pipes needed to be removed. Accordingly (and as reported in previous quarterly reports), the two 4" pipes have since been removed from the watershed and a new design intended to improve fish migration has been incorporated in the diversion modification plan for compliance with the IIFS and approved by the CWRM in its approval of the Category 3 SDWPA. This specific scope of work was part of the overall work plan referenced earlier.

- 4. Permittee shall continue to clean up and remove debris from the areas where the streams that water may be diverted from under this revocable permit are located, and staff shall inspect and report every three months on the progress of the clean-up. For purposes of clean-up, debris shall not include any structure and equipment that is either currently used for the water diversions, or for which CWRM has not required removal; "trash and debris" shall be defined as "any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)."***

Status: The Permittees have established several standard operating procedures to address the cleanup of trash and debris in the license areas. Besides recognizing unnecessary debris in the field during routine maintenance tasks, EMI has conducted specific identification and removal operations of debris that has been observed from previous fieldwork. EMI continued to be vigilant about monitoring unused material. No removals occurred/were necessary in Q3 2024.

EMI will also continue removing any equipment and excess materials it brings into the license area to perform work on the ditch system as soon as the job(s) is completed, which includes diversion modifications required to meet the 2018 IIFS.

EMI understands the term "Trash and Debris" is further defined as noted in the DLNR staff submittal. As mentioned previously, EMI has established several standard operating procedures to address the cleanup of trash and debris in the license areas. Besides recognizing unnecessary debris in the field during routine maintenance tasks, EMI has conducted specific identification and removal operations of debris that has been observed from previous field work. EMI also has a practice of removing any equipment and excess materials it brings into the license area to perform work on the ditch system as soon as the job(s) is completed. These practices continue to apply to the "Trash and Debris" term as more clearly defined by DLNR staff.

5. The revocable permit shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL);

Status: EMI acknowledges that the RPs shall be subject to any existing or future reservation of water for the DHHL.

6. Permittee shall coordinate with an interim committee to discuss water usage issues in the areas where the streams that water may be diverted from under this revocable permit are located. The committee shall consist of seven members, representing EMI/Mahi Pono, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the Huelo Community Association, the Sierra Club, the County of Maui, and Na Moku Aupuni O Ko'olau Hui. The interim committee shall meet as least quarterly, more often as useful.

Status: The quarterly meeting of the RP Committee was held on Thursday, October 24, 2024. Jenna Shibano (Mahi Pono / EMI) sent an invitation via email to the Committee on Friday, October 4, 2024. The meeting was attended by Grant Nakama (Mahi Pono / EMI), Jerome Kekiwi, Jr. (NHLC / Na Moku), Eva Blumenstein (County of Maui), John Stufflebean (County of Maui), Mark Vaught (EMI), and Jenna Shibano (Mahi Pono / EMI).

EMI provided an update on the work related to the implementation of the IIFS, and Mahi Pono supplied an update on farming operations. The information provided by Mahi Pono and EMI to the Committee generally mirrored the farming and IIFS updates that are included as exhibits to this quarterly report. The meeting adjourned approximately 15 minutes after it started. The committee's next meeting is tentatively set for January 23, 2025.

7. *It is an essential component to the Board's stewardship of the water resource to understand how much water is being diverted. Permittee shall therefore provide quarterly reports to the Board of Land and Natural Resources (Board) containing (at a minimum) the following information:*

- a. The amount of water actually used on a monthly basis, including the monthly amount of water delivered for: the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses; and reservoir/fire protection/hydroelectric uses. Descriptions of diversified agricultural uses shall also provide information as to acreage, location, crop, and use of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water.**

Status: The amount of water used on a monthly basis, including the monthly amount of water delivered for the County of Maui DWS and Kula Ag Park, diversified agriculture, industrial and non-agricultural uses, and reservoir/fire protection/hydroelectric uses can be found in the table attached as Exhibit A. The acreage, location, crop, and users of agricultural water, and the specifics on industrial and non-agricultural uses can be found in the table attached as Exhibit B.

As Mahi Pono prepares new fields for planting, they continue to install new irrigation systems that focus on efficient water application measures. In addition to these new systems, we are also installing weed mat throughout the farm, which help the soil

2024 EAST MAUI WATER PERMIT
BLNR CONDITIONS: STATUS OF COMPLIANCE
AS OF SEPTEMBER 30, 2024
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maintain moisture by reducing evaporation. Compared to prior years, the cumulative water efficiency effects of these initiatives can be seen in the proportionate reduction in the amount of water remaining in the final column of the table attached as Exhibit A.

b. An estimate of the system loss for both the EMI ditch system and the A&B field system, also on a monthly basis.

Status: The accepted Final Environmental Impact Statement which considers East Maui water diversions facilitated by a long-term lease contains estimates for system losses for both the EMI ditch system as well as the “A&B field system”.

- EMI Ditch System – As stated in the FEIS, a USGS study “concluded that it was unclear whether net seepage losses even occur in the EMI Aqueduct system, due to the large amount of tunnel in the system, as well as the seepage gains that enter the system.”
- A&B Field System – An estimate of the system losses by month is as shown in the table below:

Month	EMI Ditch System (in MGD)	County's Diverted Reserve (in MGD)	Field System (in MGD)
July	0	3.08	-1.08
August	0	4.12	4.79
September	0	4.17	4.32
Average	0	3.79	2.68

As noted by Condition #1 above, system losses and evaporation shall not be considered as a waste of water provided that system losses do not exceed 22.7%.

- c. For each stream that is subject to the 6/20/2018 CWRM D&O, a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been modified or removed as required by CWRM.

Status: EMI prioritizes its compliance with the CWRM order and has been working with CWRM staff on implementation plans and permitting. EMI notes that the language of the CWRM order relating to the removal of artificial structures is spelled out on page 269 of the D&O, items i, j, and k which State in part that "it is intended that diversion structures only need to be modified to the degree necessary to accomplish the amended IIFS and to allow for passage of stream biota, if needed." and "The intent of the Commission is to allow for the continued use and viability of the EMI ditch system and will not require the complete removal of diversions unless necessary to achieve the IIFS." A status update is provided in the table attached as Exhibit C. Also included in Exhibit C is a copy of the section of the CWRM order relating to the removal of artificial structures.

- d. Update on removal of trash, unused man-made structures, equipment, and debris that serve no useful purpose, including documenting any reports of such items that Permittee has received from the Department, other public or private entities and members of the general public and the action(s) taken by Permittee, if any, to remove the reported items

Status: See above response to #4 above.

- e. The method and timeline for discontinuing the diversion of water from Waipio and Hanehoi streams into the Ho'olawa stream, including status updates on implementation.

Status: As the stream levels fluctuate during inclement weather, EMI personnel are dispatched to manually control the intake gates to prevent excess stream water inflow to the ditch. As for Haneho'i, all intakes have been sealed (per the 2018 D&O);

therefore, no water enters the ditch from this stream.
Regarding the Waipi'o stream, EMI personnel manually control the intakes on the ditch to prevent excess flow from entering the ditch. Thus, all flows to the ditch are delivered to and used by Mahi Pono and the County of Maui. The flows are no longer controlled into Ho'olawa stream.

f. A listing of all reservoirs in the A&B/EMI water system serviced by the RPs, with the following information provided for each:

The capacity of each such reservoir:

The surface area of each such reservoir:

What fields are irrigated by each such reservoir:

Which reservoirs are lined, and with what material, and which are not:

The estimated amount of evaporation per day from the surface of each such reservoir:

An analysis of the cost and time to line at least one such reservoir; and

Information on any reservoirs planned to be taken out of service.

Status: A table containing most of the information requested above is attached as Exhibit D. Evaporation estimates are based on actual reservoir water levels during Q3 2024, with the figures being displayed in gallons per day.

In addition to the information in Exhibit D, we previously determined an estimated unit cost in 2022 of \$7.00 per square foot (sloped) to line a reservoir, plus estimated engineering costs typically being between \$30k - \$60k per reservoir.

Adjusting for CPI, it is assumed that the current estimated unit cost is \$7.60 per square foot. If we apply these costs to a reservoir with a 10-acre surface area and assumed slope adjustment of 25%, then the resulting estimate would be approximately \$4.18M.

g. The number, location, timing, and approximate acreage of fires fought during the quarter using water from reservoirs supplied with water from the A&B/EMI system.

Status: There was one fire fought during Q3 2024 using water from reservoirs supplied with water from the A&B/EMI system. An estimated 20,000 gallons were used from Reservoir 42, and the fire burned an estimated 100 acres in Field 407. Please visit this link for news coverage:
<https://mauiNOW.com/2024/07/08/firefighters-responding-to-central-maui-fire-near-pulehu-road/>.

h. The names and locations of the reservoirs from which water was drawn to fight fires during the quarter, together with:

(i) Whether those reservoirs are lined or not:

Status: Reservoir 42 in our Central Maui fields was used during the quarter. The reservoir is not lined. For other information on this reservoir, please see Exhibit D.

(ii) The average depth of water in those reservoirs:

Status: 9.6 feet.

(iii) Estimated average monthly inflows and outflows from those reservoirs; and

Status: 2 million gallons inflow and outflow daily, or 60 million gallons inflow and outflow monthly.

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(iv) The amount of water used for hydroelectric purposes, if any.

Status: No water was used for hydroelectric purposes during the quarter.

i. A listing of all irrigation wells in the A&B/EMI water system serviced by the RPs, with the water levels and chloride levels in each well that is in active use noted.

Status: In Q3 2024, Wells 2, 3, 9, 12 and 13 were in active use. Chloride levels measured during the quarter are provided below:

- Well #2
 - o pH – 7.5
 - o Sodium – 183 mg/L
 - o Water Level – 36.5 Inches
- Well #3
 - o pH – 7.6
 - o Sodium – 139 mg/L
 - o Water Level – 63.75 Inches
- Well #9
 - o pH – 7.6
 - o Sodium – 127 mg/L
 - o Water Level – 26.5 Inches
- Well #12
 - o pH – 7.4
 - o Sodium – 220 mg/L
 - o Water Level – 23.75 Inches
- Well #13
 - o pH – 7.3
 - o Sodium – 143 mg/L

- Water Level – 22.25 Inches

Each quarterly report shall be submitted in a format with tracked changes that clearly show the differences/updates from the prior quarter.

Such quarterly reports shall be “due” to the DLNR one month after the last calendar day of the subject quarter. Thus, the reports shall come due as follows:

Q1 Report – April 30, 2024

Q2 Report – July 31, 2024

Q3 Report – October 31, 2024

Q4 Report – January 30, 2025

Status: This Q3 2024 report is the second report to be submitted with changes tracked after the re-numbering of conditions. The deadline to submit quarterly reports is noted, and EMI is committed to timely submittals of all future reports.

- 8. Require Permittee to advise any third-party lessees, that any decisions they make are based on these month-to-month revocable permits for water unless or until a license is issued.**

Status: All third-party lessees have been informed through existing language in their lease agreements that the availability of water is subject to change based on various conditions, one of which would be the nature of the water availability from East Maui through an annually renewed revocable permit or an eventual permanent lease.

- 9. Permittee shall cooperate with CWRM and the Department’s Division of Aquatic Resources (DAR) in facilitating studies, site inspections and other actions as necessary to address the streams that water may be diverted from under this revocable permit.**

Status: EMI continues to be in contact with CWRM personnel regarding site visits to evaluate diversions that weren't covered by the 2018 D&O. Such site visits most recently occurred in Q2 2024, related to the amendment of the Huelo Streams IIFS passed by CWRM in 2022. CWRM field staff conducts these site visits on a stream-by-stream basis. EMI has previously contacted DAR and has expressed willingness to cooperate with any DAR activities related to the DAR work on streams outside the license area. Permittees also note that the 2024 RP allows for the development, diversion, and use of water only; there was no disposition of the land area covered by the prior revocable permits. As noted in the December 2023 staff submittal, the agreement between the Territory of Hawaii and EMI ("1938 Agreement") provides EMI a perpetual easement from the Territory to convey all water covered by any water license held by EMI through the portions of the "aqueduct" crossing government lands situated in East Maui extending from Nahiku to Honopou inclusive. Because the existing aqueduct system is already covered by the easement in the 1938 Agreement, there was no need for an additional land disposition. Accordingly, DAR has full access to the area.

10. Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in its quarterly reports.

Status: EMI has worked with CWRM in the context of the earlier discussion with DOFAW regarding diversion structures that can impede free flow of water and create habitat for mosquito breeding. Considerable evaluation and analysis have been conducted by the CWRM and EMI on nine "Category 1" diversions regarding additional work to be done on these diversions to mitigate these and other issues. CWRM has met with stakeholders to discuss this plan, and CWRM staff presented a proposed mitigation plan which was approved at CWRM's January 30, 2024 meeting. This plan calls for additional removal of stream diversion structures. Permittees are working with consultants to obtain the necessary approvals/sign offs from the State Historic Preservation Division and the County of Maui Planning Department, which are required before work can begin. Other regulatory agency reviews/approvals, including the Army Corps of

Engineers and the Office of Conservation and Coastal Lands, will be needed once those two agencies sign off.

11. If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.

Status: EMI remains willing to comply with this requirement and stands ready to assist the Board in any way it can regarding this matter.

12. For water used for agricultural crops, Permittee is to estimate how much water is required for each crop per acre per day.

Status: Water requirements for each crop is highly dependent on several factors, including soil composition, weather, and the maturity of the crop itself. That said, the average water requirements for Mahi Pono's agricultural crops at full maturity are estimated to be as follows:

- Orchard Crops - 5,089 gallons per acre per day
- Row Crops - 3,392 gallons per acre per day
- Tropical Fruits - 4,999 gallons per acre per day
- Energy Crops - 3,392 gallons per acre per day

These estimates are consistent with the estimated water requirements contained in Table 3 of Appendix I (Agricultural and related Economic Impacts) of the EIS. The average water requirements listed above are reflective of the crops' collective water needs (irrigation & rainfall) at full maturity. This differs from the reported irrigation average, which is reflective of the irrigation consumption (excluding rainfall) of immature crops.

13. Permittee shall look into supplying the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, be considered a reasonable and beneficial and permitted use under the revocable permit.

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Status: EMI/Mahi Pono have successfully provided MISC with water to support their operations starting in Q1 2023. In Q2, EMI successfully installed a meter on the pipeline supplying MISC with water. The total amount of water used by MISC between July 2024 – October 2024 was 14,300 gallons, and the Q3 2024 portion of this use is accounted for in the “*Other*” column in Exhibit A.

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EXHIBIT A – MONTHLY WATER USAGE

All Figures in Millions of Gallons per Day ("MGD")

Month	East Maui Surface Water @ Honopou	East Maui Surface Water @ Maliko	East Maui Surface Water Gained from Area Between Honopou and Maliko	Groundwater Pumped on-Farm	County of Maui DWS ¹	County of Maui Ag Park ²	Diversified Agriculture ³	Historic / Industrial Uses ⁴	Reservoir / Seepage / Fire Protection / Evaporation / Dust Control / Hydroelectric ⁵	
									Diverted Reserve to meet Contractual Obligation to County DWS & Ag Park ⁶	Other ⁷
January	29.95	31.70	1.75	1.35	0.32	0.44	22.32	0.04	6.75	3.19
February	32.31	33.62	1.31	7.31	1.03	0.42	29.93	0.04	6.05	3.47
March	39.39	40.34	0.94	3.38	2.19	0.40	31.36	0.03	4.90	4.83
April	33.47	34.53	1.06	4.27	1.38	0.61	28.59	0.04	5.51	2.68
May	30.84	34.77	3.93	4.07	0.69	0.46	27.33	0.04	6.35	3.97
June	36.70	37.01	0.31	5.57	1.74	0.53	31.08	0.04	5.23	3.96
July	34.97	37.47	2.49	5.04	3.49	0.93	36.05	0.04	3.08	-1.08
August	33.25	34.89	1.64	10.62	2.76	0.62	33.19	0.04	4.12	4.79
September	28.72	31.59	2.87	7.38	2.76	0.58	27.09	0.06	4.17	4.32
2024 Average	33.29	35.10	1.81	5.44	1.82	0.55	29.66	0.04	5.13	3.35

1. The numbers in this column are based on reports received from the County of Maui and have not been independently verified by EMI.
2. The numbers in this column are based on reports received from the County of Maui and have not been independently verified by EMI.
3. The numbers in this column are primarily comprised of Mahi Pono's water use for diversified agriculture, as well as the other agricultural uses described in Exhibit B of the quarterly RP reports.
4. Historical/Industrial Uses are non-HC&S uses that have historically relied on water from the EMI Ditch System, even after the closure of HC&S. These include uses by entities located either adjacent to or within the boundaries of the farm and are further described in Exhibit B. HC&D's water usage is no longer accounted for in this column as HC&D is obtaining water from its own well.
5. The numbers in these columns include water not separately accounted for in the columns to the left. The water in on-farm reservoirs is available for use by the County of Maui against brush fires, the risk of which has increased due to the reduction of the irrigated acreage following the cessation of sugar cultivation but is decreasing as Mahi Pono continues to implement its farm plan. Seepage and evaporation inherent to an agricultural ditch system are also included in this column. The water used by the Mahi Pono hydroelectric

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system is non-consumptive and is returned to the ditch after being used to generate clean energy. The water is re-used consumptively by one of the other uses, or if there is no reuse, ends up in the reservoirs.

6. Operationally and pursuant to a contractual agreement with the County of Maui, a minimum of approximately 6 MGD must be reliably conveyed to / made available to the County each and every day so that the County has flexibility regarding when to run its plant depending on weather conditions, demand, water available from its Piihola plant, etc. Additionally, a minimum of approximately 1.5 MGD must be reliably conveyed to / made available to the County each and every day so that the County can be flexible regarding how to meet the needs of the Ag Park. The numbers in this sub-column reflect the portion of the 7.5 MGD that is made available to the County every day, that the County does not use (i.e., 7.5 MGD less the sum of the amounts used by the County DWS at Kamole Weir and Ag Park). Water that is not used by the County remains in the Ditch System, is transported to Central Maui and any excess is directed to reservoirs located on the farm.
7. The numbers in these columns reflect the amount of water not separately accounted for in the columns entitled "County of Maui DWS," "County of Maui Ag Park," "Diversified Agriculture," and "Historic/Industrial Uses" less the reserve needed to meet EMI's contractual obligations to the County of Maui. As has been explained in the past, EMI/Mahi Pono cannot rely on receiving any specific amount of the water provided to the County of Maui to meet the contractual obligations to the County DWS and Kula Ag Park that is not actually consumed by the County ("DIVERTED RESERVE") for the purposes of planning to meet the irrigation needs of Mahi Pono's crops. The amount is unpredictable and unreliable; however, EMI/Mahi Pono do make an effort to use the Diverted Reserve for crop irrigation when feasible. The negative number in this column for the month of July reflects EMI/Mahi Pono's use of a portion of the Diverted Reserve in the month of July for irrigation purposes.

EXHIBIT B – WATER USAGE SPECIFICS
Diversified Agriculture Use

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Entity	Crop	Field	Acreage
Mahi Pono	Macadamia	205	122
Mahi Pono	Citrus	206	200
Mahi Pono	Macadamia	208	73
Mahi Pono	Citrus	209	156
Mahi Pono	Citrus	300	305
Mahi Pono	Coffee	301	273
Mahi Pono	Coffee	302	6
Mahi Pono	Citrus	303	161
Mahi Pono	Citrus	311	150
Maui Best (Tenant)	Sweet Potato	408	281
Maui Best (Tenant)	Sweet Potato	409	180
Mahi Pono	Citrus	500	273
Mahi Pono	Citrus	501	83
Mahi Pono	Citrus	502	290
Mahi Pono	Citrus	503	144
Mahi Pono	Citrus	504	294
Mahi Pono	Citrus	505	240
Mahi Pono	Citrus	506	157
Mahi Pono	Citrus	507	189
Mahi Pono	Citrus	508	183
Mahi Pono	Citrus	508B	213
Mahi Pono	Citrus	509	79
Mahi Pono	Citrus	510	181
Mahi Pono	Citrus	511	161
Mahi Pono	Citrus	512	132
Mahi Pono	Citrus	601	221
Mahi Pono	Citrus	602	196
Mahi Pono	Citrus	603	262
Mahi Pono	Citrus	604	343
Mahi Pono	Citrus	605	394
Mahi Pono	Citrus	606	134
Mahi Pono	Mixed	608	70
Mahi Pono	Citrus	610	40
Mahi Pono	Macadamia	611	253
Mahi Pono	Citrus	701	269
Mahi Pono	Citrus	702	232
Mahi Pono	Citrus	703	150
Mahi Pono	Citrus	704	214
Mahi Pono	Row Crops	706ON	42
Mahi Pono	Row Crops	707W	82
Mahi Pono	Citrus	708	299
Mahi Pono	Citrus	800	122
Mahi Pono	Citrus	801	281
Mahi Pono	Citrus	803A	127
Mahi Pono	Pongamia	803B	32
Mahi Pono	Avocado	803C	6
Mahi Pono	Citrus	805	268
Mahi Pono	Coffee	807	120
Mahi Pono	Mixed	807	39
Mahi Pono	Citrus	808	158
Mahi Pono	Citrus	809	251
Mahi Pono	Citrus	809X	72
Mahi Pono	Citrus	813	448
Mahi Pono	Citrus	814	342
Mahi Pono	Citrus	818	266
Mahi Pono	Citrus	901A	45
Mahi Pono	Citrus	911	82
Mahi Pono	Citrus	911B	201
TOTAL			10,587

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EXHIBIT B – WATER USAGE SPECIFICS (Continued)
Historic / Industrial Uses

Water Users	Source/Delivery Point	Water User's Location	Relationship to EMI / A&B / Mahi Pono	Use
Tenant of County Central Maui Landfill	Pumped from Haiku Ditch	3-8-003-019	Gov't Tenant	General Use for Compost Operation
New Leaf Ranch (Non-Profit)	702 Cistern	3-8-006-029	Tenant	Irrigation water for non-profit providing ag-related work opportunities and training as mental health & substance use dependency treatment
Costo Maddela	Haiku Ditch	3-8-001-001	Tenant	Pasture & Animal Water

EXHIBIT C – CWRM ORDER STATUS UPDATE
Section i, j, & k from CWRM D&O

i. It is intended that diversion structures only need to be modified to the degree necessary to accomplish the amended IIFS and to allow for passage of stream biota, if needed.

j. This Order does not require that every diversion on every tributary be removed or modified, the Commission is only looking at modifications to main stem and major diversions to accomplish the amended IIFS set forth above. The Commission also recognizes that it is not the purpose of this proceeding to determine how the diversions will be modified. That issue will be before the Commission in a subsequent process.

k. The intent of the Commission is to allow for the continued use and viability of the EMI Ditch system and will not require the complete removal of diversions unless necessary to achieve the IIFS.

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**EXHIBIT C – CWRM ORDER STATUS UPDATE (Continued)
IIFS STREAM UPDATE**

Stream Name	Restoration Status	BRQSO at IIFS (cfs)	IIFS Value (cfs)	IIFS Location	Current Status
Malakapi	Full	1.3	n/a	Above Hana Highway	Gate removed, water flowing downstream below intake
Hanawai	Connectivity	4.6	0.92	Below Hana Highway	Gate slightly open, water flowing downstream below intake
Kapula	Connectivity	2.8	0.56	On diversion at Koolau Ditch	Main gate open, water flowing downstream below intake
Waaaka	None	0.77	0.77	Above Hana Highway	Gate open, water flowing downstream below intake
Pa'aka'a	Connectivity	0.9	0.18	At Hana Highway	Intake gate closed, water flowing downstream over dam
Waiohine	Full	5	n/a	At Hana Highway	Intake gate closed, sluice gate removed. All water flowing downstream.
Pu'aka'a	Connectivity	1.1	0.2	Above Hana Highway	Gate open, water flowing downstream below intake
Kopiliia	H90	5	3.2	Below Hana Highway	Main gates open, ditch control gates adjusted to provide for IIFS. Water flowing downstream.
East Wailuiki	H90	5.8	3.7	At Hana Highway	Sluice gate open, IIFS flowing downstream below intake
West Wailuiki	Full	6	n/a	Above Hana Highway	Gates open, water flowing downstream below intake
Waiuanui	Full	6.1	n/a	At Hana Highway	All intakes sealed (Category 1) and gates opened, water flowing downstream below intake
Ohia/Waiuanu	None	4.7	n/a	None	No diversion
Waiohania	Full	3.9	n/a	Below diversion at Koolau Ditch	All intakes closed, water flowing downstream
Palauhulu	Full	11	n/a	Above Hana Highway	All intakes sealed (Category 2). Water flowing downstream.
Pihina'u	Full	14	n/a	Above Hana Highway	Intake sealed, water flowing downstream.
Nua'alua	Connectivity	0.28	2.2	To Be Determined	Intake gate closed, water flowing downstream over dam
Honomanu	H90	4.2	4.2	Above Hana Highway	All 4 diversion sluice gates are open, water flowing downstream
Punahoa/Kohia	H90	4.5	2.9	Above Hana Highway	Sluice gate open, water flowing downstream below intake
Hakua'ena	Connectivity	4.9	1.36	Below Hana Highway	Intake gate closed, water flowing downstream, dam will require modification
Puhoikanea	Connectivity	8.4	1.1	Below Hana Highway	Intake gate will be used to ensure water flowing downstream, intake dam may require significant modification
Wahiopae	None	0.9	0.9	Above Hana Highway	No diversion. Water flowing downstream.
Wakamoi	H90	6.7	3.8	Above Hana Highway	Center ditch sluice gate open. Water flowing downstream.
Haneho'i	Full	2.54	n/a	Upstream of Lower Ditch	Intakes sealed. Water flowing downstream.
Huio (Pohua)	Full	1.47	n/a	Downstream of Haku Ditch	Lower intake will require significant modifications (Category 3) & corresponding permit approvals / Haku intake sealed
Honopou	Full	6.5	n/a	Below Hana Highway	Three of the four intakes are sealed. The final has the ditch gate shut. No water enters the ditch. Waiole intakes sealed.

EXHIBIT D – RESERVOIR INFORMATION

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Reservoir No.	Tax Map Key	Capacity Million Gallons	Surface Area Acres	Fields Feeder by Reservoir	Lined	Type Material	Evaporation Rate (Average Gal/Da)*****
14	2-5-04:39	9.50	1.50	100; 101	No	Earthen	0
15	2-5-04:39	8.30	1.10	101	No	Earthen	0
20	2-5-03:10	48.80	10.20	312; 314	No	Earthen	0
21	2-5-04:39	18.60	6.90	111; 113; 200	No	Earthen	0
22	2-5-03:10	43.80	10.60	201; 202	No	Earthen	0
24	2-5-03:10	15.00	3.60	201	Yes	Concrete	0
25	2-5-03:09	40.20	9.70	205	No	Earthen	0
30	2-5-03:01	21.00	9.00	300; 312	No	Earthen	0
33	2-5-02:02	46.50	8.00	304; 304; 313	No	Earthen	61,493
40	2-5-02:01	62.80	13.50	410; 400; 401; 413 (County Use)	No	Earthen	0
42	2-5-02:01	10.40	3.20	400; 401; 403	No	Earthen	14,385
52	3-8-03:04	74.00	20.00	504; 511	No	Earthen	0
60	3-8-01:06	80.50	20.80	600; 611	No	Earthen	0
61	3-8-01:01	53.10	9.00	604	No	Earthen	65,381
70	3-8-01:01	19.30	5.00	Mud Pile 710	No	Earthen	0
80	3-8-03:02	41.10	12.00	800; 801	No	Earthen	0
81	3-8-04:22	36.70	13.80	803 805 808 809	No	Earthen	93,903
82	3-8-04:02	17.90	7.40	810; 811; (812; 815; 816; 818; 819; 822; 823; Res. Ditch)	No	Earthen	0
84	3-8-03:02	35.10	8.00	701; 702; 703; (807; 813; 814; Res. Ditch)	No	Earthen	0
90	3-8-08:05	45.00	15.80	737; 761; 915; 917	No	Earthen	137,835
Hakku	(2)2-7-003:055 & 081	57.9	27.30	Hakku Ditch	No	Earthen	0
Pauwela	(2)2-7-003:030 & 056/2-7-008:038	32.5	6.80	Hakku Ditch	No	Earthen	0
Peahi	(2)2-8-002:018	22	5.80	Hakku Ditch	No	Earthen	0
Kapalaalaea	(2)2-8-007:001	49.7	8.70	Hakku Ditch	No	Earthen	0
Papaaea	(2)2-9-014:004	42.5	9.00	Center Ditch to Lowrie Ditch	No	Earthen	0
9	2-5-004:039	1.00	NA	110	No	Earthen	Unregulated/Rarely Used
10	2-5-004:039	9.50	NA	116	No	Earthen	Unregulated/Rarely Used
12	2-5-004:039	9.00	6.70	109	No	Earthen	Unregulated/Rarely Used
23	2-5-005:019	13.70	NA	200	Yes*	Concrete/rubber	Unregulated/Rarely Used
26	2-5-005:019	10.10	NA	208	No	Earthen	Unregulated/Rarely Used
29	2-5-005:019	9.90	NA	213	No	Earthen	Unregulated/Rarely Used
31	2-5-003:031	5.10	NA	303	No	Earthen	Unregulated/Rarely Used
32	2-5-002:002	9.80	NA	304	No	Earthen	Unregulated/Rarely Used
34	2-5-003:010	8.10	NA	306	No	Earthen	Unregulated/Rarely Used
35	2-5-002:002	15.00	5.40	310; 311; 505	No	Earthen	Unregulated/Used Sparingly
41	2-5-002:001	8.90	NA	402; 404	No	Earthen	Unregulated/Rarely Used
43	2-5-001:001	13.50	4.00	409; 404	No	Earthen	Unregulated/Rarely Used
44	2-5-001:008	3.60	NA	Above 417;	No	Earthen	Unregulated/Rarely Used
45	2-5-001:008	4.20	NA	415; 414; 418	Yes	Concrete	Unregulated/Rarely Used
50	3-8-003:005	8.40	NA	209; 500; 507; 508	No	Earthen	Unregulated/Used Sparingly
51	3-8-003:004	15.20	NA	502; 505	No	Earthen	Unregulated/Rarely Used
83	3-8-004:002	6.40	4.70	817; 821	No	Earthen	Unregulated/Rarely Used

Monthly & Annual Average Water Use Report

A&B / EMI 2024 Revocable Water Permit – October 2024

Month	East Maui Surface Water @ Honopou	East Maui Surface Water @ Maliko	East Maui Surface Water Gained from Area Between Honopou and Maliko	Groundwater Pumped on-Farm	County of Maui DWS ¹	County of Maui Ag Park ²	Diversified Agriculture ³	Historic / Industrial Uses ⁴	Reservoir / Seepage / Fire Protection / Evaporation / Dust Control / Hydroelectric ⁵	
									Diverted Reserve to meet Contractual Obligation to County DWS & Ag Park ⁶	Other ⁷
January	29.95	31.70	1.75	1.35	0.32	0.44	22.32	0.04	6.75	3.19
February	32.31	33.62	1.31	7.31	1.03	0.42	29.93	0.04	6.05	3.47
March	39.39	40.34	0.94	3.38	2.19	0.40	31.36	0.03	4.90	4.83
April	33.47	34.53	1.06	4.27	1.38	0.61	28.59	0.04	5.51	2.68
May	30.84	34.77	3.93	4.07	0.69	0.46	27.33	0.04	6.35	3.97
June	36.70	37.01	0.31	5.57	1.74	0.53	31.08	0.04	5.23	3.96
July	34.97	37.47	2.49	5.04	3.49	0.93	36.05	0.04	3.08	-1.08
August	33.25	34.89	1.64	10.62	2.76	0.62	33.19	0.04	4.12	4.79
September	28.72	31.59	2.87	7.38	2.76	0.58	27.09	0.06	4.17	4.32
October	25.33	26.62	1.30	16.87	3.74	0.52	35.57	0.05	3.23	0.37
November										
December										
2024 Average	32.49	34.25	1.76	6.59	2.01	0.55	30.25	0.04	4.94	3.05

1. The numbers in this column are based on reports received from the County of Maui and have not been independently verified by EMI.
2. The numbers in this column are based on reports received from the County of Maui and have not been independently verified by EMI.
3. The numbers in this column are primarily comprised of Mahi Pono's water use for diversified agriculture, as well as the other agricultural uses described in Exhibit B of the quarterly RP reports.
4. Historical/Industrial Uses are non-HC&S uses that have historically relied on water from the EMI Ditch System, even after the closure of HC&S. These include uses by entities located either adjacent to or within the boundaries of the farm and are further described in Exhibit B. Mahi Pono installed meters in March 2022 thus, starting with the Q2 2022 report, the figures reported in this column will reflect actual usage based on those meters. As previously mentioned, HC&D's water usage is no longer accounted for in this column as HC&D is obtaining water from its own well.
5. The numbers in these columns include water not separately accounted for in the columns to the left. The water in on-farm reservoirs is available for use by the County of Maui against brush fires, the risk of which has increased due to the reduction of the irrigated acreage following the cessation of sugar cultivation but is decreasing as Mahi Pono continues to implement its farm plan. Seepage and evaporation inherent to an agricultural ditch system are also included in this column. The water used by the Mahi Pono hydroelectric

EXHIBIT C

Monthly & Annual Average Water Use Report

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system is non-consumptive and is returned to the ditch after being used to generate clean energy. The water is re-used consumptively by one of the other uses, or if there is no reuse, ends up in the reservoirs.

6. Operationally and pursuant to a contractual agreement with the County of Maui, a minimum of approximately 6 MGD must be reliably conveyed to / made available to the County each and every day so that the County has flexibility regarding when to run its plant depending on weather conditions, demand, water available from its Piiholo plant, etc. Additionally, a minimum of approximately 1.5 MGD must be reliably conveyed to / made available to the County each and every day so that the County can be flexible regarding how to meet the needs of the Ag Park. The numbers in this sub-column reflect the portion of the 7.5 MGD that is made available to the County every day, that the County does not use (i.e., 7.5 MGD less the sum of the amounts used by the County DWS at Kamole Weir and Ag Park). Water that is not used by the County remains in the Ditch System, is transported to Central Maui and any excess is directed to reservoirs located on the former plantation.
7. The numbers in these columns reflect the amount of water not separately accounted for in the columns entitled "County of Maui DWS," "County of Maui Ag Park," "Diversified Agriculture," and "Historic/Industrial Uses" less the reserve needed to meet EMI's contractual obligations to the County of Maui. As has been explained in the past, EMI/Mahi Pono cannot rely on receiving any specific amount of the water provided to the County of Maui to meet the contractual obligations to the County DWS and Kula Ag Park that is not actually consumed by the County ("DIVERTED RESERVE") for the purposes of planning to meet the irrigation needs of Mahi Pono's crops. The amount is unpredictable and unreliable; however, EMI and Mahi Pono do make an effort to use the Diverted Reserve for crop irrigation when feasible.